Supreme Court, U.S.
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UNITED STATES SUPREME COURT

OCTOBER, 1994, TERM

VERMILION PARISH BUS DRIVERS AND
OPERATORS ASSOCIATION and
JEFFREY J. FAULK, SR.,
Petitioners

VERSUS

VERMILION PARISH SCHOOL BOARD, ET AL,
Respondents

ON PETITION FOR WRITS OF CERTIORARI AND
MANDAMUS TO THE UNITED STATES COURT
OF APPEALS, FOR THE FIFTH CIRCUIT

PETITION FOR WRITS OF CERTIORARI AND MANDAMUS

J. MINOS SIMON
1408 West Pinhook Road
Post Office Box 52116
Lafayette, LA 70505-2116
Telephone: (318) 233-4625

Attorney for Petitioners

QUESTIONS PRESENTED

1. Where state law requires a state agency to conduct a public and plenary hearing before imposing discipline on or discharge of an employee, can a federal court sanction a lesser and different hearing without denying the employee's constitutional liberty?

2. Is speech by the president of a labor union delivered publicly to a state political body, protesting that body's abuse of power which is harmful to the union members, a speech of public concern or a speech of private concern?

3. Where a state agency illegally imposes sanctions upon its employee, does the threat of further sanction, if the

employee seeks judicial redress, or reversal, constitute a violation of the employee's constitutional liberty?

PARTIES TO THE PROCEEDING

A. Petitioners

1. Jeffrey J. Faulk, Sr.
2. Vermilion Parish Bus Drivers' and Operators' Association

B. Respondents

1. Vermilion Parish School Board
2. Daniel R. Dartez
3. Calvin E. Woodruff, Jr.
4. Anthony J. Fontana, Jr.
5. Kibbie P. Pillette
6. Hampton J. Primeaux
7. Cecil J. Hebert
8. Carroll E. LeBlanc
9. Herman J. Suire
10. Duffy G. Marceaux, Jr.

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OPINIONS BELOW

This is a 42 U.S.C. § 1983 claim instituted by plaintiffs against a public body, the Vermilion Parish School Board, its officers and members filed in the United States District Court, Western District of Louisiana, bearing district court docket No. 92-0922. The district court rendered summary judgment dismissing plaintiffs' complaint and further assigned written reasons for judgment in an unpublished opinion dated September 30, 1993. The depositions, documents, and affidavits presented by plaintiffs at the district court level for consideration clearly established a case contemplated by Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975 (1990). The district court, however, avoided an assessment of the facts presented within the context of Zinermon.

Instead the district court avoided a discussion or a decision of these facts by interposing the decisions of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) and Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3195 (1984), holding that the defendants' actions was random action and therefore plaintiffs were not denied of a predeprivation hearing. The district court further supported its opinion by denying the existence of evidence clearly appearing of record against the Assistant District Attorney, Calvin E. Woodruff, Jr.

Further the district court erroneously determined that Mr. Faulk's speech, in his role as president of the bus drivers' union, threatening union action against the school board if it did not cease its statutorily-prohibited

hiring practices, was not speech on a matter of public concern.

On appeal, in yet another unpublished opinion, bearing docket No. 93-5434, the Fifth Circuit Court of Appeals affirmed the judgment dismissing plaintiffs' lawsuit. In so doing, however, the appellate court did not decide the merits of the district court's opinion, i.e., it avoided any discussion of Zinermon and the Parratt/Hudson doctrine. Instead, the appellate court applied an inapplicable standard of due process, as enounced in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), eschewing existing and applicable state law predeprivation due process standards, and thereby avoided a discussion of the decision of the district court and the merits of

plaintiffs' claims. The appellate court also avoided a determination of the merits of plaintiffs' claims against Assistant District Attorney Woodruff, adopting a statement of the district court that plaintiffs presented no documentary evidence to support their claims against Woodruff. By disclaiming the existence of plaintiffs' evidence the appellate court failed to consider and give effect to the factual basis of plaintiffs' claim of First Amendment violation, including the claim that plaintiffs were denied access to the courts as retaliation against plaintiff Faulk for speaking out on matters of public concern within the meaning of Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

From these erroneous decisions and both courts' refusal to consider the

affidavits and the School Board deposition, plaintiffs seek a writ of certiorari or, alternatively, a writ of mandamus ordering the lower courts to use the record evidence and evaluate it in light of controlling law.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit rendered the decision complained of on April 28, 1994, and denied Petitioners' timely application for a rehearing on May 26, 1994.

Thus, pursuant to Supreme Court Rule 13, 28 U.S.C. § 1254(1), and 28 U.S.C. § 1651, your petitioners, Jeffrey J. Faulk, Sr. and the Vermilion Parish Bus Drivers and Operators Association seek review of the court of appeals' decision affirming the district court's erroneous and

improperly considered summary judgment and/or a remand of the case for decision upon a proper consideration of the record evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment 1:

Congress shall make no law... abridging the freedom of speech...or the right of the people...to petition the Government for a redress of grievances.

U.S. Constitution, Amendment 10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Constitution, Amendment 14:

...No State shall...deprive any person of life, liberty, or property, without due process of law;...

42 U.S.C. § 1983:

Every person who, under color of any statute...of any State...subjects...any citizen of the United States...to the deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured in an action at law,...

Fed. Rule Civ. P. 56(c):

...The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law....

La.R.S. 14:66:

Extortion is the communication of threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description....

La.R.S. 16:2(A):

The district attorneys of the several judicial districts of Louisiana, other than the parish of Orleans, shall ex officio be the regular attorneys and counsel for the police juries, parish school boards, and city school boards within their respective districts...

La.R.S. 17:158(A)(1):

...each parish and city school board shall provide free transportation for any student attending a school of suitable grade approved by the State Board of Elementary and Secondary Education within the jurisdictional boundaries of the parish or school board if the student resides more than one mile from such school.

La.R.S. 17:492:

Each school bus operator shall serve a probationary term of three years reckoned from the date of his first employment in the parish in which the operator is serving his probation.

La.R.S. 17:493:

A. A permanent school bus operator shall not be removed from his position except upon written and signed charges of willful neglect of duty, or incompetence,...and then only if found guilty after a hearing by the school board of the parish...in which the school bus operator is employed....

B. All hearings hereunder shall be private or public, at the option of the operator affected thereby....The operator affected shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder, the board shall have the power to issue subpoenas to compel the attendance of all witnesses on behalf of the operator. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction.

C. If a permanent school bus operator is found guilty by a school board, after due and legal hearing as provided herein, on charges of willful neglect of duty, or of incompetency,...and ordered removed from office, or disciplined by the board, the superintendent with approval of the board shall furnish to the school bus operator a written statement of recommendation of removal or discipline, which shall include but not be limited to the exact reason, offense, or instance upon which the recommendation is based. Such operator may, not more than one year from the date

of the said finding, petition a court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the matter....

La.R.S. 17:500(C)(c) (1990):

At any time a substitute bus operator has been driving a route for more than ninety consecutive school days, the school board shall review the circumstances of the regular operator to be certain that the continued use of a substitute operator is warranted and appropriate.

La.R.S. 23:981:

It is hereby declared to be the public policy of Louisiana that all persons shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist labor organizations or to refrain from any such activities.

La.R.S. 32:398:

A. The driver of a vehicle involved in an accident resulting in injury to or death of any person, or property damage in excess of one hundred dollars shall:

(1) Immediately, by the quickest means of communication, give notice of the accident to the local police department if the accident occurs within an incorporated city or town; or if the accident occurs outside of an incorporated city or town,

to the nearest sheriff's office of state police station.

(2) Give his name, address, and the registration number of the vehicle he was driving, and upon request, and if available, exhibit his license or permit to drive, to any person injured in such accident or to the driver or occupant of or person attending any vehicle or other property damaged in the accident.

STATEMENT OF THE CASE

This case, premised in the district court upon federal question jurisdiction, 28 U.S.C. § 1331, presents claims Petitioners brought, pursuant to 42 U.S.C. § 1983, against the Vermilion Parish School Board, its individual members, its superintendent, Daniel R. Dartez. Suit was filed on May 20, 1992, and was amended on August 12, 1992 to include Vermilion Parish Assistant District Attorney Calvin E. Woodruff, Jr, the School Board attorney pursuant to La.R.S. 16:2(A).

Initially, Petitioners sought a temporary restraining order. On June 2, 1992, the district court denied such relief, and in due course, defendants answered the petition. A scheduling conference took place on December 16, 1992, following which on February 2, 1993,

defendants moved for summary judgment. Action on the motion was deferred until Petitioners could complete discovery.

On April 19, 1993, Petitioners also moved for summary judgment on liability. On July 9, 1993, the district court postponed action on the motions until August 10, 1993. Then on September 30, 1993, some five months after the filing of Petitioners' motion for summary judgment, the district court granted the defendants' motion for summary judgment. Plaintiffs appealed this decision on October 22, 1993.

On April 28, 1994, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision in an unsigned per curiam opinion. Thereafter, the court of appeals denied Petitioners' timely-filed petition for

rehearing on May 26, 1994, leading to the instant petition for writs of certiorari and/or mandamus.

Petitioner, Jeffrey J. Faulk, Sr., was a tenured bus driver with over 25 years employment in the service of the Vermilion Parish School Board. La.R.S. 17:492 sets forth that to become tenured, a driver must accumulate three (3) years of uninterrupted service. Achieving tenure provides the bus driver with the right, at his election, to either an open or a closed, executive session hearing on discipline **or** termination. La.R.S. 17:493.

Mr. Faulk also served as the president of the Vermilion Parish Bus Drivers' and Operators Association, and the state bus drivers' association. The

Vermilion Parish association is also a petitioner herein.

Petitioners' (hereinafter Mr. Faulk and/or the Association) claims stem from a series of retaliatory actions visited upon Mr. Faulk due to his representation of the Association as its president. During the course of and immediately following union contract negotiations with the School Board, Mr. Faulk demanded that the board stop its statutorily-prohibited practice of hiring substitute drivers for indeterminate periods of time exceeding ninety (90) days. See La.R.S. 17:500(C)(c) (1990).

The effect of this illegal practice was to deflate the prevailing wage for the bus drivers, dilute the Association's membership because substitute drivers are ineligible for membership in the

Association, and to weaken the collective bargaining strength of this union representing an essential class of public employees. See La.R.S. 17:158(A)(1), providing that school boards are required to provide bus transportation to public school students.

School Board members became incensed that a lowly bus driver would tell them to follow the law. In May 1991, Mr. Faulk was told by defendant board member Cecil J. Hebert that the "board members" were "pissed off" at him. (See Faulk Affidavit, Appendix pp. A-84-85.) The board then began harassing Mr. Faulk in retaliation for his speech against the board's prohibited practices.

In July 1991, Mr. Faulk was suspended from his position for a period of five (5) days as the result of an admittedly false

charge that he had failed to "immediately" report an accident in violation of school policy and the law. This accident occurred on May 1, 1991, just before Mr. Faulk was told of the board's animus toward him, but the retaliation culminated after Mr. Faulk had angered the board members.

Superintendent Dartez admitted during deposition, however, that the "policy" Mr. Faulk allegedly violated was not effective at the time of the accident because it was "never brought before the Board for approval; therefore never handed out." This admission is memorialized in Dartez' own handwritten notes on the proposed policy. (See Dartez Notes, Appendix p. A-100.) Further, Dartez admitted that Mr. Faulk had "immediately" reported the accident when he got home after his route,

because Mr. Faulk was "[p]retty close to, yes, I guess so." (See Dartez Deposition p. 243, Appendix pp. A-104-105.) Mr. Faulk reported the accident only forty (40) minutes after its occurrence, after dropping off his last student, and returning home.

Furthermore, Louisiana statutory law shows that the accident need not have been reported to the police because Mr. Faulk and the other driver agreed that damages did not apparently exceed $100.00, and the students on Mr. Faulk's bus all stated that they had not been injured. See La.R.S. 32:398.

This suspension was also made in violation of Mr. Faulk's right to a tenure hearing as specified in La.R.S. 17:493, requiring as a jurisdictional predicate to such a hearing that the board first lodge

charge(s) against the driver. No such charge(s) were ever proffered by the board, as shown by Faulk's attorney at the time, Howard Martin. (See Martin Letter, Appendix p. A-106.)

Later, on April 2, 1992, Mr. Faulk was again suspended on a fabricated charge, this time that he had slapped an unruly student on January 24, 1992. Superintendent Dartez' own written report to the board depicts the known falsity of the charge: "I would not recommend the convening of a La. R.S. 17:493 Hearing for termination due to legal ramifications arising from the inconsistent testimony. A position supported [sic] the Board's legal counsel who also participated in the hearing process." (See Superintendent's Recommendation, Appendix p. A-118.) That "counsel" was Woodruff. Dartez sought

only a suspension without realizing that suspensions also require § 17:493 hearings, per subsection C thereof.

Dartez' report to the School Board was the culmination of a warped, and undeniably biased "investigation" in which Dartez improperly assembled a contractually-mandated investigative team that was supposed to be composed of two persons appointed by the superintendent and one by the affected driver. The contract further provided that the team report its findings to the superintendent who would in turn make recommendations to the School Board.

Incredibly, Dartez appointed *himself* and his assistant superintendent, Mr. Alleman to two of the three positions on the team hoping their weight on the team would produce favorably skewed findings.

Dartez shamelessly justified this action by stating no more than that the contract did not explicitly prohibit his self-appointment: "it doesn't say I can't." (See Deposition pages 112-113, Appendix pp. 101-103.)

Miraculously, the team reached an inconclusive finding, determining no more than that the unruly student had cursed Mr. Faulk. Yet, Dartez, reporting the "team's" findings to himself in his erstwhile role as superintendent, then falsely *recast* the team's conclusions into the positive statement that Mr. Faulk "did strike Randy Baldridge." (See Team Report and Superintendent's Recommendation, Appendix pp. 111-118.)

All of these and the other illegal and punitive actions challenged in Mr. Faulk's petition are memorialized in the

board's 516 page deposition, largely given by Dartez, and the documents produced pursuant to subpoena during that deposition. This deposition is a self-damning catalog of the sins of these defendants and was introduced into the record in opposition to the defendants' summary judgment motion.

Later, the School Board's counsel, Woodruff, threatened Faulk with termination if he did not acquiesce in and accept his suspension for allegedly slapping the student. This fact, amounting to a denial of Mr. Faulk's substantive First Amendment due process right of access to the courts, was memorialized in the affidavit of Mr. Faulk's former counsel, Mr. J. Isaac Funderburk. (See Funderburk Affidavit, Appendix pp. A-98-99.) This affidavit was

also duly submitted to the district court in opposition to defendants' summary judgment motion.

Nevertheless, the district court did not consider these pieces of evidence, and in fact denied their existence. At pages 11 and 12 of the district court opinion (Appendix pp. A-50-54), Judge Doherty displayed the continuing hostility to Mr. Faulk's claims that inexplicably pre-dated discovery in this case. As Judge Doherty herself declares, she even questioned Mr. Faulk's right to adduce evidence in support of a claim *he knew to be viable*, and this hostility perhaps led her to ignore the evidence Mr. Faulk's was able to adduce. Upon ruling against Mr. Faulk, the district court declared that Mr. Faulk produced "no documentation, affidavits, deposition testimony, etc., to support

their claims against Mr. Woodruff." Id. Yet, in complete contradiction of that assertion, it is seen that Mr. Funderburk's affidavit bears the district court clerk's stamp with the date "May 26 1992;" further, the district court clerk's "exhibit" sheet, contained in the court of appeals record at page 254, shows that the board deposition was in his possession and available to the district court as well to the court of appeals.

Astonishingly, the Fifth Circuit Court of Appeals affirmed the decision of the district court, also declaring that no evidence existed to support Mr. Faulk's claims. This shocking error then permitted the court of appeals to declare a void and then examine Mr. Faulk's claims in that void. Thus, the court of appeals concluded that Mr. Faulk had received all

the due process protections *the School Board* alleged he was due, in accordance with this Honorable Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). This denial also permitted the court of appeals to avoid reaching Mr. Faulk's Zinermon claim, as well as to deny his First Amendment public speech retaliation and denial of access to the courts claims.

In so doing, the court of appeals utterly failed to adjudicate Mr. Faulk's claims on appeal. Had the evidence been acknowledged and considered, the court of appeals would have been compelled to find that Petitioners' First Amendment and civil rights had been trampled, that the facts of this case fell squarely within the purview of this Honorable Court's

Zinermon decision, and that summary judgment in favor of defendants was entirely inappropriate.

These errors lead Petitioners to seek either a dispositive decision of this Honorable Court on writ of certiorari, or a remand of the case to the lower courts on a writ of mandamus for an authored opinion actually examining the record evidence in light of controlling law.

ARGUMENT

1. Where state law requires a state agency to conduct a **public** and plenary hearing before imposing discipline on or discharge of an employee, a federal court commits egregious error in applying a lesser or different predeprivation hearing standard.

Plaintiffs' complaint presents a claim for constitutional protection as to their property and liberty interests, i.e., their property and liberty interests created by state law but deprived by state officials acting under color of state law. Faulk's state-created property and liberty interests stemmed from La.R.S. 17:492, granting him tenure in his position after attaining three (3) years service in his position as a parish bus driver, and La.R.S. 17:493, specifying the exacting type of tenure hearing to which he was entitled when being disciplined or terminated from that employment. The

predicates for such hearings are charges levied by the Board, which was admittedly not done in the case of Faulk's bus accident suspension, and the driver's election of an open, public hearing or a closed, executive session hearing, admittedly denied when Faulk was convicted in absentia in the case of the alleged slapping incident suspension.

The Fifth Circuit Court of Appeals, however, refused to protect plaintiffs' demonstrated property and liberty interests as established by state law. That the appellate court intended not to enforce these interests is made manifest by the following statement of the court of appeals:-

> Appellant's first complaint is that the district court committed egregious error in incorrectly dismissing his Due Process claims because he was denied a pre-deprivation due

process hearing. Appellant's position is that the state statute affords him a more elaborate pre-deprivation hearing that [sic] the minimum "notice and opportunity to be heard" standards dictated by the United States Constitution. He looks to this court to enforce the Louisiana statutory pre-deprivation procedures. For the following reasons, we affirm the district court on this point.

The Fourteenth Amendment requires only that a party "be given notice and an opportunity to be heard."

* * *

Since it is clear that the appellant received both notice and an opportunity to respond to the charges against him before any deprivation or interruption in his right to continued employment occurred, we affirm the district court's judgment on this alleged point of error. It appears that Faulk is complaining about the result reached in those hearings, and for that La. Rev. Stat. 17:493(c) provides an adequate remedy of review through the state court system. Because we find that the pre-deprivation due process was sufficient, we need not address the value of any post-deprivation remedies in light of the Parratt/Hudson doctrine. Court of Appeal

Opinion at pp. 7 - 11 (footnote omitted; emphasis added).

These statements sandwich a lengthy quotation from this Honorable Court's opinion in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), in which this Court decided that the deficient procedural standards surrounding the Parma Board of Education's extension of civil service protection did not limit the reach of constitutional due process.

The Parma Board of Education in Loudermill argued that its employees took their civil service protection subject to whatever procedures they extended in the grant of the civil service protections. 470 U.S. at 539-540, 105 S.Ct. at 1492. In rejecting that argument, this Court explained that where the property right to continued employment was extended, civil

service protections had to meet minimal constitutional standards of due process. 470 U.S. at 541, 105 S.Ct. at 1492-1493.

In Loudermill, the procedures, which provided only for a posttermination administrative hearing and court review of that decision, were found to fall *below* minimal due process requirements, resulting in the imposition of a requirement that a *pre*termination hearing be held. In order to demonstrate that such a requirement would not impose a great burden in the case of such otherwise deficient procedures, this Court explained that such a hearing need not be elaborate. 470 U.S. at 545, 105 S.Ct. at 1495.

This led the Fifth Circuit Court of Appeals, in this case, to declare that no public employee is entitled to more than this minimal protection. This decision is

consistent with the court of appeals' decision in Eguia v. Tompkins, 756 F.2d 1130 (5th Cir. 1985), in which the court explained its position:

> The state's breach of its own procedures [granting greater than minimal protections] in the deprivation of a property interest rises to the level of a constitutional violation only when the state's actions do not comport with the process that would be required in the absence of the state statute. To hold otherwise would be to acknowledge a constitutional requirement of one due process for the citizens of Texas, another for the citizens of Louisiana, and yet another for the citizens of each state. We decline to make such a shambles of the Constitution's uniform grant of rights to all United States citizens. 756 F.2d at 1137 n.11.

Such sentiments, however, ignore the essential function of § 1983, which is to protect the various citizens of the nation in the exercise of their various states' extended liberties. See Zinermon v.

Burch, 494 U.S. 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990):

> In *Monroe*, this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law. It explained that § 1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." 494 U.S. at 124, 110 S.Ct. at 982 (citing with approval Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); emphasis added).

To declare otherwise, and follow the Fifth Circuit's reasoning would be to ignore the fact that different states do have different statutes setting forth different

statutory schemes for the protection of its employees. For the Fifth Circuit to compel all public employees to bring their § 1983 claims down to the constitutional baseline would amount to the court's abrogation of § 1983; violation of the Tenth Amendment, which reserves to the states the right to set their own requirements for the qualification and removal of their employees; and disobedience to the rule of law which forbids federal courts' legislating state law.

42 U.S.C. § 1983, as seen above, protects the citizens of the states from the denial of their *state-created property rights* by state officials acting under color of state law. See Zinermon, *supra*; Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548

(1972)("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

Further, the states retain the power under the Tenth Amendment to define the nature of the employment relationship, in the qualifications and disabilities of their employees. See Gregory v. Ashcroft, 111 S.Ct. 2395 (1991):

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at the heart of representative government. It is a power reserved to the States under the Tenth Amendment

> and guaranteed them by that provision of the Constitution under which the United States guarantees to every State in this Union a Republican Form of Government.
>
> * * *
>
> ...As against Congress' powers to regulate Commerce...among the several States, the authority of the people of the States to determine the qualifications of their government officials may be inviolate. Id. at 2402-2403 (citations and internal quotations omitted).

Accord Equal Employment Opportunity Commission v. Commonwealth of Massachusetts, 987 F.2d 64 (1st Cir. 1993)("No one disputes the proposition that the historic functions of regulating the relationship between the public employer and public employees have traditionally been left to the states.").

Thus, Louisiana has an overriding interest in the enforcement of La.R.S. 17:493's protections which cannot be trammeled by the Fifth Circuit Court of

Appeals in the manner expressed in the latter's decision in this case. La.R.S. 17:493 has been deemed to embody the public policy of the state, See Miller v. Rapides Parish School Board, 209 La. 877, 25 So.2d 623 (1946), and pursuant to subsection B of the statute, no secret or "executive" hearing regarding any disciplinary action may be conducted by the Board except with the consent of the operator. Additionally, La.R.S. 23:981 protects Faulk's union activities from the Board's predations:

> It is hereby declared to be the public policy of Louisiana that all persons shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist labor organizations or to refrain from any such activities. (Emphasis added.)

These statements of the law of Louisiana must be accepted unconditionally by the

federal courts. See International Woodworkers of America v. McCloud River Lumber Co., 119 F.Supp. 475, 486 (N.D.Cal. 1953)("The public policy of a State, as emphatically declared as it is in [La.R.S. 17:493 and 23:981], cannot be ignored by a Federal Court in a matter clearly within the ambit of State power."); See also Rehm v. Interstate Motor Freight System, 133 F.2d 154, 157 (6th Cir. 1943)("It is not the function of a Federal court either to legitimatize [sic], or to bastardize, the brain-child of state courts in diversity of citizenship cases. Since Erie R. Co. v. Tompkins,...the duty of United States courts in such cases is to ascertain, construe and apply static state law: not to limit, modify or repeal state doctrine."). Thus, the Fifth Circuit must accept state law as it is given to them;

the court of appeals was not free to whittle it down to a uniform, minimally constitutional standard more suited to rejecting states' citizens' rights under § 1983 than protecting them.

Accordingly, it is seen that the Fifth Circuit has read Loudermill far too broadly in its application to this and other cases. Loudermill properly stands only for the proposition that where state procedures are deficient, a minimal predeprivation hearing must be accorded a public employee before deprivation of protected employment status. The case does not stand for the proposition that no one is entitled to greater protections, as the state may provide.

In fact, if Louisiana's laws had been respected and implemented by the defendants, plaintiffs would not have

filed the instant lawsuit. But state officials did not implement the applicable state law. The refusal of the court of appeals to protect plaintiffs' property and liberty interests as created by state law, as it did, denies to plaintiffs the very remedy to which they are entitled under the provisions of 42 U.S.C. § 1983. That decision is also at war with Zinermon v. Burch, *supra*, where this Court stated:

> As was noted in *Monroe*, in many cases there is "no quarrel with the state laws on the books," id., at 176, 81 S.Ct., at 478; instead, the problem is the way those laws are or are not implemented by state officials. 494 U.S. at 125, 110 S.Ct. at 983 (emphasis added).

Similarly, plaintiffs' problem "is the way [applicable state laws were] not implemented by state officials." But in speaking to the purpose and scope of § 1983, the Monroe court held:

> The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. 81 S.Ct. at 480 (emphasis added).

The court of appeals found that it did not need to reach this question because it considered that Mr. Faulk had received all the pre-deprivation process he was due. Court of Appeals Opinion, at 9-11. This conclusion is unconditionally contradicted by the deposition on file which unmistakably discloses that the School Board took premeditated action to deny Mr. Faulk's rights to a tenure hearing, and to fire him. The pretextual charges against

Mr. Faulk were admittedly false, without factual or policy support.

Specifically, when Mr. Faulk was suspended for allegedly having slapped a student, the court of appeals stated that the investigative hearing *stemming from the improperly weighted and composed investigative "team"* sufficed as all the process that was due to him. This conclusion ignores, and is further defeated by the undisputed facts that the School Board was required to honor Mr. Faulk's choice of an open tenure hearing under R.S. 17:493, but instead proceeded to conduct a secret hearing in his absence.

The Fifth Circuit merely engaged in an abstract discussion of the sufficiency or adequacy of any predeprivation hearing it believes occurred. Then plaintiffs

rights were tested not against the standard of predeprivation hearing mandated by state law, but against the lesser standard of predeprivation hearing evolved in Loudermill, *supra*. It is respectfully submitted that the rationale of the court in so interpreting the provisions of § 1983 turns the statute on its head. In short, the appellate court concluded that it would not enforce plaintiffs' state-created liberty and property interests, but would substitute the lesser standard of predeprivation hearing of the Fourteenth Amendment. This is an astonishing constitutional doctrine. It engages the court in refusing to recognize the laws of a state, enacted in the exercise of the reserved powers of that state under the Tenth Amendment, by refusing to protect citizens against the

willful conduct of state officials denying to the citizens the benefits of these laws.

It is undisputed that the School Board knew that Mr. Faulk had previously objected to a closed, executive session hearing because Dartez had admitted such in the School Board deposition. When the School Board then conducted a secret hearing in Faulk's absence over his known objection to such a hearing, it abused its power, obligation, and jurisdiction to hold the type of hearing required by positive state law and the state's public policy.

Thus, the court of appeals erroneously concluded that Mr. Faulk had received predeprivation due process, and did not reach the necessary and correct conclusion that the Zinermon analysis

should apply. Such decisionmaking cannot stand as the expression of federal justice, and the decision of the court of appeals must be reversed.

2. Mr. Faulk's speech, in his representative role as union president, concerning the School Board's statutorily-prohibited hiring practices which are harmful to the members of this essential, mandated class of public employees, is speech on a matter of public concern.

It must be recalled that this case was dismissed on defendants' motion for summary judgment, which placed the lower courts, when determining whether Faulk's speech was protected as touching on matters of public or private concern, in the position of examining his evidence in the light most favorable to his position, that his speech was protected. See McPherson v. Rankin, 786 F.2d 1291 (5th Cir. 1986), affirmed sub. nom. Rankin v.

McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987):

> We emphasize the procedural juncture of the instant case. Reading the record in the light most favorable to the party opposing summary judgment, we must conclude that the district court erred in granting summary judgment on the issue of whether the speech reached an issue of public concern. *See McPherson v. Rankin*, 736 F.2d 175 (5th Cir. 1984)(summary judgment inappropriate since motives and context were relevant to a determination of the protected status of the speech),... 786 F.2d at 1295.

Accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986):

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we

> suggest that the trial courts should act other than with caution in granting summary judgment... (Citation omitted.)

However, in this case both lower courts erred in determining that Faulk's speech was not on a matter of public concern, and rendered decisions conflicting with an analogous decision of the Ninth Circuit Court of Appeals, McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) as to the protected status of public employee union activity. Further, the lower courts failed to consider graphic evidence of the documented public concern exemplified in numerous front-page local newspaper articles chronicling Faulk's travails with the School Board. This led the lower courts to conclude, in a vacuum, that Faulk's speech was not protected public speech within the meaning of Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75

L.Ed.2d 708 (1983) and Rankin v. McPherson, *supra*.

Ignoring the fact that the Association's contract with the School Board *was the first ever*, and thus of great public concern in this context, the district court declared that the question of whether Faulk's speech was on a matter of public concern, and hence protected, or on a matter of private concern, and unprotected, was merely a matter of law for the court to determine:

> A determination of "public concern" is a question of law to be resolved by the court. This Court finds that Mr. Faulk's statements concerning the "substitute" drivers do not rise to the level of "public concern," as the speech in question was primarily concerned with Mr. Faulk's representation of the Vermilion Parish Bus Drivers' Association. Although, it may be inferred that the alleged retaliation by the School Board was directed at Mr. Faulk, as the Association's

> president, the statement about the "substitutes" was not sufficient to be deemed a matter of public concern. District Court Opinion at p.22 (citations omitted).

The court of appeals merely parroted this statement, without engaging in any of its own analysis of the issue. While this paraphrase of Connick v. Myers, *supra*, is partially correct, the method by which the court reached its conclusion was wholly incorrect.

The undisputed facts establish that the School Board is statutorily mandated to provide school bus transportation for its students. La.R.S. 158(A)(1). As such, the members of the Vermilion Parish Bus Drivers' and Operators Association comprise a class of necessary public employees. Their president, acting in his representative capacity, challenged the statutorily-prohibited School Board

practice of keeping "substitute" bus drivers on the public payroll for indeterminate periods of time exceeding ninety (90) days. See La.R.S. 500(C)(c) (1990). The Board's practices deflated the prevailing wage of the bus drivers, diluted the Association's membership because substitutes are ineligible for membership in the Association, and weakened the collective bargaining strength of this union representing this essential class of public employees. All of this came on the heels of the ratification of the first ever contract between the union and the School Board.

Incensed that an "uppity" bus driver would tell them to follow the law, the board members then set about casting for any excuse to sanction and silence Faulk

for telling this public body to follow the law.

Then, by denigrating these facts and ignoring record evidence, specifically the newspaper articles, both courts incorrectly felt justified in declaring that Faulk's speech, even though made by the president of a union for an entire class of necessary and statutorily-mandated public employees concerning its public contract bargaining position, was not on a matter of public concern.

However, in McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983), the Ninth Circuit explained why such matters do implicate matters of public concern:

> Plaintiff's speech dealt with the rate of compensation for members of the city's police force and, more generally, with the working relationship between the police union and elected city officials. First, compensation levels undoubtedly

> affect the ability of the city to attract and retain qualified police personnel, and the competency of the police force is surely a matter of great public concern. Second, the interrelationship between city management and its employees is closely connected with "discipline and morale in the workplace" - factors that are related to an agency's efficient performance of its duties." Connick, __ U.S. __, 103 S.Ct. at 1691....Third, the way in which an elected officail or his appointed surrogates deal with diverse and sometimes opposing viewpoints from within government is an important attribute of public service about which the members of society are entitled to know. Finally, plaintiff's speech was specifically and purposefully directed to the public both through city council meetings and a television interview. 705 F.2d at 1114-1115.

Accord Gray v. Lacke, 885 F.2d 399, 414 (7th Cir. 1989)("On prior occasions, courts have recognized that grievances submitted on behalf of other individuals

often touch upon matters of public concern.")(citing McKinley with approval).

Petitioners do not believe, even if Connick holds that characterizing public versus private speech has been deemed a legal question, that this determination can be made in a self-imposed vacuum of knowledge, or that documented public concern can be swept into a legal purgatory by judicial *fiat*.

However, this Court, in Connick and Rankin, *supra*, had already foreclosed such a possibility by requiring the courts to consider the entire context in which the speech was made, that its goals be analyzed, and that the role of its proponent be examined for personal or broader motivation. See Connick, 461 U.S. at 147-148, 103 S.Ct. at 1690-1691 ("Whether an employee's speech addresses a

matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.")(emphasis added, footnote omitted); Rankin, 483 U.S. at 384-386, 107 S.Ct. at 2897-2898. The lower courts' failure to complete this task by failing to consider the record evidence was therefore erroneous not only in the conclusion reached, but in the method used to reach that conclusion. The law cannot exist in isolation from the realities to which it is designed to apply.

It cannot be denied that where the School Board acts venomously toward those who succeed in obtaining a bargained contract between a union and its public employer, in pursuit of the union members' rights under the declared public policy of the State of Louisiana protecting those

who engage in union activities, La.R.S. 23:981, that such action, and the speech challenging adverse action are matters of public concern. This contract was the first ever between these parties. So when the Board set about undermining that contract, and attacking the union's president for challenging that action, it becomes a matter of public concern to all who would do business with the School Board. They wonder if they will be similarly treated. Should they even enter into contracts with this public entity that does not keep its word? How will this affect the ability of the public to obtain service from this agency or of the agency to contract for services with others?

These are the concerns succinctly recognized by the McKinley court. Of

course such actions implicate public concerns, because they demonstrate how the Board members are fulfulling their responsibilities to provide the best and safest transportation to the children depending upon it. But the School Board's actions in this case cast doubt on its members' ability to function. All of these reasons show why this controversy has been the subject of repeated newspaper interest.

Both lower courts failed to recognize these implications, and therefore failed to properly analyze this issue. Furthermore, they failed to draw these favorable inferences in favor of Mr. Faulk and the Association, under the strictures of summary judgment analysis. These errors must be corrected, and the Fifth Circuit's faulty "analysis" of the

protected status of union activity speech must be conformed to that of the Ninth Circuit.

3. The court of appeals failed to comprehend that the denial of Petitioners' First Amendment rights included the denial of their right of access to the courts where defendant, Woodruff threatened Faulk with termination if he attempted to vindicate his rights.

Where the court of appeals declared that there was no denial of Mr. Faulk's First Amendment free speech rights, Opinion, at 11-13, it did so on the basis that Mr. Faulk's speech could not be characterized as protected public speech. Petitioners do not concede this point, as above, but show that a retaliatory discharge is only one aspect of the First Amendment rights violations visited upon your Petitioners.

The other rights violation visited upon your Petitioners concerns defendants' attempt to deny Mr. Faulk of his right of access to the courts, a substantive right protected by the First Amendment. Woodruff actually threatened Faulk with termination if he did not acquiesce in the illegal actions of the School Board suspending him for allegedly slapping the student, Randy Baldridge.

The Fifth Circuit Court of Appeals affirmed the district court's dismissal of Mr. Faulk's claims against defendants by paraphrasing the decision of, and concluding, as did the district court, that there was no record evidence introduced to defeat defendants' Motion for Summary Judgment. On page 14, of the court of appeals' opinion, it was declared that "[i]n opposing a motion for summary

judgment, 'an adverse party may not rest upon the mere allegations or denials of his pleading, but by his response by affidavits or as otherwise provided in (Fed. R. Civ. P. 56), must set forth specific facts showing there is a genuine issue for trial.'"

However, both lower courts must have overlooked the affidavit of J. Isaac Funderburk, in order to make this statement. It was affirmatively set forth in Mr. Funderburk's affidavit, which bears the stamp of the district court clerk in its upper lefthand corner:

> 2) That after the Board imposed a ten (10) day suspension upon Faulk in connection with the alleged corporal punishment, he (Funderburk) was told by the Board's counsel, Calvin "Woody" Woodruff that if Faulk did not take the suspension, he would be inviting a removal hearing pursuant to LSA-R.S. 17:493.

In failing to recognize this First Amendment violation, the Fifth Circuit Court of Appeals ignored its own seminal opinion on the substantive nature of the right of access to the courts:

> The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution. In *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907), the Supreme Court characterized this right of access in the following terms:
>
> > The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to [its] citizens....
>
> * * * * *
>
> This court recognized the first amendment right of access to the courts in *Wilson v. Thompson*, 503 F.2d 1375 (5th

> Cir. 1979), where we stated: "It is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances."
>
> * * * * *
>
> A third constitutional basis for the right of access to the courts is found in the due process clause.
>
> * * * * *
>
> A mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be "adequate, effective, and meaningful." Interference with the right of access to the courts gives rise to a claim for relief under section 1983....

Ryland v. Shapiro, 708 F.2d 967, 971-972 (5th Cir. 1983)(citations omitted, emphasis added).

Where Woodruff threatened Mr. Faulk with even more adverse action, his termination, if he did not accept the suspension illegally imposed upon him as a result of the alleged slapping incident, Woodruff committed a criminal act of

extortion, See La.R.S. 14:66, in an attempt to threaten Mr. Faulk into silence and to prevent him from seeking redress in the courts.

This without more was a violation of Mr. Faulk's First Amendment right. See Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986), where the court was confronted with defendants who sought to expropriate the plaintiff's blueberry farm after plaintiff sued them to stop unlawful sewerage outflows from a treatment facility. In condemning this action, the court stated:

> An individual's constitutional right of access to the courts cannot be impaired, either directly or indirectly, by threatening or harassing an individual in retaliation for filing lawsuits. It is not necessary that the individual succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the

> individual's right of access. The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. An act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper. An individual is entitled to free and unhampered access to the courts. Id. at 1427-1428 (citations and internal quotations omitted, emphasis added).

See also Bradley v. Pittsburgh Board of Education, 910 F.2d 1172, 1177 (3rd Cir. 1990)(collecting cases).

Thus, defendants can take no refuge in arguing that Mr. Faulk's right to appeal his suspension was adequately provided for where they, through their attorney Woodruff, attempted to deny his

right of access to the courts altogether. See Funderburk Affidavit. Such action is undeniably a First Amendment violation, which the court of appeals utterly failed to address, through the combined errors of failing to consider the record evidence, and in failing to consider the First Amendment claims fully raised in Mr. Faulk's petition.

The courts also overlooked the affidavit of Mr. Faulk himself, in which Faulk describes the animus motivating the School Board's actions against him in paragraphs 5, 6, 7, 8, and 9. Additionally, the deposition of the Vermilion Parish School Board was introduced into the record, in which Superintendent Dartez admitted defendant Woodruff's knowing involvement in the

illegal actions taken against Faulk and the Association.

Parenthetically, it must be noted that the district court's gratuitous characterization of Mr. Faulk's claims against Woodruff, as being "loosely based" upon a theory of § 1983 liability stemming from a conspiracy between a private citizen and state actors, misses the mark. But, it is the necessary product of the district court's failure to consider Mr. Funderburk's affidavit. Had the district court considered that affidavit, it would have realized that that document set forth facts showing that Woodruff's actions amounted not only to a conspiracy, but an independent violation of Mr. Faulk's substantive First Amendment right of access to the courts. Woodruff, a Vermilion Parish Assistant District

Attorney, was himself a state actor, acting on behalf of the School Board pursuant to La.R.S. 16:2(A). Thus, no "conspiracy" need be alleged to find Woodruff liable for violating Petitioners' rights under § 1983.

In overlooking the record evidence, both courts further violated their affirmative duties to fully and independently consider the record on this appeal of a summary judgment, and thereby denied Petitioners of due process in the consideration of their claims against defendants. These errors cannot go without correction, and amount to a gross departure from proper judicial proceedings. This practice also conflicts with the decisional law of other circuits requiring courts to examine the *entire*

record, not just that evidence that may have been "marked in red."

Unfortunately, this Honorable Court has yet to set forth the scope of a federal court's obligation to consider the record when handling a summary judgment motion pursuant to Fed. Rule Civ. P. 56(c), which contains no apparent limitation on the courts' duty to examine "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits."

Mr. Faulk believed that under the standard enounced in Higgenbotham v. Ochsner Foundation Hospital, 607 F.2d 653, 656 n.3 (5th Cir. 1979)(courts are not permitted to ignore record evidence in a record that is not voluminous), the court of appeals would correct the district court's errors. See also John v. State of

Louisiana Board of Trustees for State Colleges and Universities, 757 F.2d 698, 711-712 (5th Cir. 1985)(court similarly admonished district courts not to shirk their duty to fully examine record evidence); Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477, 482 (9th Cir. 1988)(a "complex" antitrust case); Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922, 930 (1st Cir. 1983)("...we find the principle attractive.").

Other circuit courts of appeals, however, do not permit the perceived size of a record to limit the scope of examination. This is undoubtedly due to the standardless determination a court would make in deeming a record "complex" or "voluminous," and the lack of any such concept in Rule 56. See Ottensmeyer v.

Chesapeake & Potomac Telephone Company of Maryland, 756 F.2d 986 (4th Cir. 1985)("The appellate court must search the record...)(Emphasis added); Brock v. American Postal Workers Union, Chicago Local, 815 F.2d 466, 469 (7th Cir. 1987)("...the reviewing court must consider the entire record...")(Emphasis added); Accord Glass v. Dachel, 2 F.3d 733, 739 (7th Cir. 1993)(citing Higgenbotham with approval); See also Tippens v. Celotex Corp., 805 F.2d 949, 952 (11th Cir. 1986):

> The District Court shall consider all evidence in the record when reviewing a motion for summary judgment - pleadings, deposition, interrogatories, affidavits, etc. - and can only grant summary judgment 'if *everything* in the record...demonstrates that no genuine issue of material fact exists.' 'Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of

> overkill in its use.' (Italics in original, citations omitted).

Other decisions indicate that a conflict may exist even within the Fifth and the Eleventh Circuits as a result of the 1981 division of these circuits and the Eleventh Circuit's adoption of the former Fifth Circuit's precedents through Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981). See John v. State of Louisiana, *supra*, at 712 ("Again, we need not attempt to reconcile the apparent conflict or make a choice between conflicting rules, if indeed there is a conflict at all."); Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1033 n.7 (5th Cir., Unit B, 1982)(A "[f]ormer Fifth Circuit case" arising in the Southern District of Florida).

Mr. Faulk respectfully requests that this Honorable Court approve or condemn either of these standards, or set forth one consistent standard, rather than join the lower courts and the defendants in denying Petitioners of their rights to due process by perpetuating the district court's myth of missing evidence.

Mr. Faulk further submits that even if the Fifth or Ninth Circuit standards are correct, that the record in this case was not sufficiently "voluminous" to permit the district court to fail to recognize and consider the evidence he produced. This is not a case in which a court could not find the evidence, rather this is a case in which the court "warned" plaintiff against eliciting evidence. Recall the district court's announced

reluctance to even permit Mr Faulk to assert a claim against Woodruff.

In another instance, however, the Fifth Circuit has recognized that district court reluctance to examine a record should result *in a more thorough examination* of the record. See Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 n.8 (5th Cir. 1980):

> We place special emphasis on this point in light of certain of the court's comments at the pretrial conference. Referring to a motion to dismiss a party for lack of jurisdiction, the court said: I'm not going to go through a bunch of depositions to try to find out what the situation is. I'm going to decide it on the papers relating to the motion.

Recall Judge Doherty's announced declaration, even before the petition was amended and evidence adduced, that she doubted naming Woodruff as a defendant would serve "the ends of justice,"

whereupon she stated her intention to sanction undersigned counsel if no evidence was produced. Perhaps unsurprisingly, she found no such evidence despite its presence in the record, as shown by the clerk of court's stamp at the top of Funderburk's affidavit. Your petitioners' astonishment increased when the court of appeals uncritically paraphrased the district court's written reasons for judgment and affirmed its ruling on this point.

Petitioners now must seek either a writ of certiorari or a writ of mandamus to correct these errors. They were unable to do so in the court of appeals because a complaint of judicial misconduct, like an application for a writ of mandamus, may not be used to obtain relief from an appealable order. Duckworth v. Department

of Navy, 974 F.2d 1140, 1141 (9th Cir. 1992); Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33, 34-35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980). This rule presupposes, however, that the appellate court will recognize and correct such errors of the district court. Now that the Fifth Circuit has failed to do so in this case, either or both of the writs sought here must issue so that the record evidence can be considered in light of applicable law.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari and/or writ of mandamus issue herein, that upon due consideration, the judgment of the court of appeals rendered on April 28, 1994, be duly reversed, reversing the summary judgment rendered by

the district court, and remanding this case for trial on the merits, or alternatively, that the lower court(s) be ordered to reconsider the case in light of the evidence and applicable Louisiana law, in an authored opinion, in which case this Honorable Court will address itself to the lower courts on the standard of record review incumbent upon the lower courts.

Respectfully submitted,

J. MINOS SIMON, LTD.
1408 West Pinhook Road
Post Office Box 52116
Lafayette, Louisiana 70505-2116
Telephone: (318) 233-4625

By: _____
J. MINOS SIMON
Louisiana Bar Roll No: 12278

Attorney for Petitioners

Supreme Court, U.S.
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NO. _____

UNITED STATES SUPREME COURT

OCTOBER, 1994, TERM

VERMILION PARISH BUS DRIVERS AND
OPERATORS ASSOCIATION and
JEFFREY J. FAULK, SR.,
Petitioners

VERSUS

VERMILION PARISH SCHOOL BOARD, ET AL,
Respondents

ON PETITION FOR WRITS OF CERTIORARI AND
MANDAMUS TO THE UNITED STATES COURT
OF APPEALS, FOR THE FIFTH CIRCUIT

APPENDIX TO
PETITION FOR WRITS OF
CERTIORARI AND MANDAMUS
VOLUME I OF II

J. MINOS SIMON
1408 West Pinhook Road
Post Office Box 52116
Lafayette, LA 70505-2116
Telephone: (318) 233-4625

Attorney for Petitioners

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UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 93-5434

Summary Calendar

VERMILION PARISH BUS DRIVERS AND OPERATORS ASSOCIATION AND JEFFREY J. FAULK, SR.,

Plaintiffs/Appellants,

VERSUS

VERMILION PARISH SCHOOL BOARD, DANIEL R. DARTEZ, ANTHONY J. FONTANA, JR., KIBBIE P. PILLETTE, HAMPTON J. PRIMEAUX, CECIL

J. HEBERT, CARROLL E. LeBLANC, HERMAN J. SUIRE, and DUFFY G. MARCEAUX, JR.,

Defendants/Appellees.

Appeal from the United States District Court For the Western District of Louisiana

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(92 CV 922)

Before REYNALDO G. GARZA, DUHE', and EMILIO GARZA, Circuit Judges.

PER CURIAM*:

This is a 42 U.S.C. § 1983 claim rising out of plaintiff Faulk's employment as a bus driver by the Vermilion Parish School Board. Plaintiffs-appellants, the Vermilion Parish Bus Drivers & Operators Association and its President, Jeffrey J. Faulk, Sr. ("plaintiffs"), brought this action against the appellees, Vermilion Parish School Board, its superintendent, Daniel R. Dartez and its respective individual members, (Anthony J. Fontana, Jr., Kibbie P. Pillette, Hampton J. Primeaux, Cecil

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

J. Herbert, Carroll E. LeBlanc, Herman J. Suire, Duffy G. Marceaux, Jr.). Also joined in this suit is the Vermilion Parish Assistant District Attorney and General Counsel for the School Board, Calvin Woodruff. Plaintiffs claim that Dartez, the School Board Members and Woodruff have violated their Constitutional rights by virtue of certain actions allegedly taken by the School Board concerning the employment and discipline of Faulk and the compensation of certain "substitute" bus drivers. Appellants appeal the summary judgment granted in favor of the defendants-appellees dismissing all of their claims. WE AFFIRM.

I.

In this 1983 action, plaintiffs contend that the defendants violated their Constitutional rights by virtue of

certain actions taken by the School Board concerning the employment and compensation of school bus drivers. Of concern to us on appeal are appellant Faulk's claims that he was denied due process prior to his two suspensions without pay, and that he was retaliated against for exercising his right to free speech. As detailed below, plaintiff Faulk was involved in two incidents, one involving a bus accident and the other concerned the alleged slapping of a student that resulted in the School Board disciplining Faulk with suspensions.

Faulk claims that prior to this time he had not experienced any problems with the School Board or any of its members, and his problems began when he threatened to speak out regarding the School Board's alleged violation of the law, concerning

employment of "substitute" bus drivers beyond a 90-day period.[1]

Faulk argues that the basic violations of his procedural Due Process rights occurred subsequent to the two occurrences detailed below. These

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[1] State law empowers the Board to appoint "substitute" drivers with a mandatory condition provided by LSA-R.S. 17:500(C)(c):

> At any time a substitute bus driver has been driving a route for more than 90 consecutive days, the school board shall review the circumstances of the regular operator to be certain that the continued use of a substitute operator is warranted and appropriate.

Appellants allege that the School Board have knowingly violated that state law by unlawfully continuing "substitute" drivers long after 90 days to the detriment of the Associations' membership. Moreover, it was the threat of disclosing this allegation that forms the basis of Faulk's claim that he was retaliated for exercising his free speech.

The substitute drivers are not party to this action.

principal actions resulted in two suspensions of Faulk by the Board members, which he claims were instituted without complying with the requirements of Louisiana's tenure laws, La. Rev. Stat. 17:492-93.

Incident Number 1 involved an accident between Faulk's bus and a farm truck on May 1, 1991. The Plaintiff was involved in an accident while operating his bus. According to the School Board, Faulk violated board policy and state law by failing to promptly report that accident to either the police or the School Board. Instead, Faulk left the scene of the accident and completed his route. After a hearing before the Board on July 30, 1991, Faulk was found guilty of willful neglect of duty and suspended without pay for five (5) days.

Incident Number 3 involved a complaint by a parent that Faulk had slapped a student on his school bus. Faulk was suspended by the School Board for ten (10) days effective April 27, 1992.

Plaintiff has alleged other instances where the board, Dartez, and Woodruff have sought to punish him for threatening to speak out about the substitute bus driver policy. Faulk does not claim that these incidents standing alone rise to a Constitutional violation of his civil rights, however, he claims that they represent a pattern of the School Board Members' retaliation for his speech.

Incident Number 2 involved a modification of plaintiff's bus route. Faulk alleges that the School board violated state school policy when they

required Faulk to alter his route by dropping off children on the way out of a dead end street, instead of on the way into the dead end street.

Incident Number 4 involves the School Board policy concerning the interplay between extra compensation earned by drivers for extracurricular activities and drivers' "personal leave" as granted in the bus drivers' contract, Article 10.2(a). Plaintiff claims bus drivers should not take "sick days," if in fact they are not sick, as the practice harms the drivers and the bus drivers' association.

Further, plaintiff alleges that Dartez, the School Board Members, and Woodruff decided to retaliate against him for his statements to the public that the practice of the School Board of keeping certain drivers in the position of

"substitute" was against the law. Plaintiff also alleges that his right to freedom of speech, as protected by the First Amendment, was abri[illegible]ed by Dartez, the School Board Members and Woodruff pursuant to the board's adverse actions toward him.

II.

Dismissal of Due Process Complaint

Faulk argues that he has a Constitutionally protected property interest in his right to unfettered continuance of his employment and receipt of his salary. He states that his Constitutionally protected property interest arises from La. Rev. Stat. 17:492, which grants tenure to certain bus drivers. Faulk has driven a school bus in Vermilion Parish since 1967 and therefore, has been tenured for approximately 23 years. La. Rev. Stat. 17:492 states in pertinent part:

Each school bus operator shall serve a probationary term of three (3) years reckoned from the dated of his first employment in the parish in which the operator is serving his probation. During the probationary term the parish school board may dismiss or discharge any operator upon the written recommendation of the parish superintendent of schools accompanied by valid reasons therefor.

Any school bus driver found unsatisfactory by the parish school board at the expiration of the probationary term shall be notified in writing by the school board that he has been discharged or dismissed; in the absence of such notification such probationary school bus operator shall automatically become a regular and permanent operator in the employ of the school board of the parish in which he has successfully served his probationary term.

. . .

In order to acquire tenure under the provisions hereof, each school bus operator shall personally operate and drive the school bus he is employed to operate; no one shall acquire tenure in the operation of more than one school bus.

Appellant further states that his Constitutionally protected property interest includes being allowed to perform his duties without interruption or suspension, absent being found guilty by substantial evidence, after a hearing by the board and after receiving proper notice from the superintendent all in accordance with the state law governing removal of tenured bus drivers, La. Rev. Stat. 17:493. La. Rev. Stat. 17:493 states in part:

> a. A permanent school bus operator shall not be removed from his position except upon written and signed charges of willful neglect of duty, or incompetence, or immorality, or drunkenness while on duty, or physical disability to perform his duties, or failure to keep his transfer equipment in a safe, comfortable, and practical operating condition or of being a member or contributing to any group, organization, movement, or

corporation that is prohibited by law or injunction from operating in the State, and then only if found guilty after a hearing by the school board of the parish or city in which the school bus operator is employee. . . .

b. All hearings hereunder shall be private or public, at the option of the operator affected thereby. . . . The operator affected shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder, the board shall have the power to issue subpoenas to compel the attendance of all witnesses on behalf of the operator. Nothing herein shall impair the right of appeal to a court of competent jurisdiction.

c. If a permanent school bus driver is found guilty by a school board, after due and legal hearing has provided herein, of charges of willful neglect of duty,. . . and ordered

removed from office, or disciplined by the board, the superintendent with approval of the board shall furnish to the school bus operator a written statement of recommendation of removal or discipline, which shall include but not be limited to the exact reason, offense or instance upon which the recommendation is based. **Such operator may, not more than one (1) year from the date of said finding, petition a court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the matter.** If the finding of the school board is reversed by the court and the operator is ordered reinstated and restored to duty, the operator shall be entitled to full pay for any loss of time or salary he may have sustained by reason of the action of said school board. (emphasis added).

Appellant alleges that his Due Process right arising from his interest

in continued employment was violated. Appellant's first complaint is that the district court committed egregious error in incorrectly dismissing his Due Process claims because he was denied a pre-deprivation due process hearing. Appellant's position is that the state statute affords him a more elaborate pre-deprivation hearing that the minimum "notice and opportunity to be heard" standards dictated by the United States Constitution. He looks to this court to enforce the Louisiana statutory pre-deprivation procedures. For the following reasons we affirm the district court on this point.

The Fourteenth Amendment requires only that a party "be given notice and an opportunity to be heard." Franceski v. Plaquemines Parish School Board, 772 F.2d 197, 199 (5th Cir. 1985). The United States Supreme Court has described the

standard in determining what constitutes "due process" for the more serious action of actually firing an employee as follows:

> [The] pre-termination [hearing] though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. [citations omitted.] In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. [citations omitted.]
> . . .
> [The] pre-termination hearing need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. [citations omitted.]
>
> The essential requirements of due process . . . are notice and an opportunity to respond.

> The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement. [citations omitted.] The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the store. [citations omitted.] to require more than this prior to termination would intrude to an unwanted extent on the government's interest in quickly removing an unsatisfactory employee.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985). This circuit has specifically held that due process requires only that the public employee be provided notice and an opportunity to be heard prior to his discharge. Wilson v. UT Healthcare, 973 F.2d 1263, 1270 (5th Cir. 1992), cert. denied, 113 S. Ct. 1644 (1993). In Browning v. City of Odessa, Texas, 990 F.2d 842, 844 (5th Cir. 1993), this court

found that a short meeting lasting less than thirty minutes wherein the employee simply explained his side of the story was sufficient for due process purposes. "The due process clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, 426 U.S. 341, 350 (1976).

In the instant case, Faulk was afforded more than adequate Constitutional Due Process prior to his five day suspension. By letter dated May 27, 1991, Faulk was advised that the School Board intended to conduct an investigation into his failure to promptly report his bus accident. Faulk was also fully advised of the charges and provided with the date and time of a hearing to be conducted on the charges against him. Faulk was represented by

counsel through this process, and this counsel met with the school superintendent to more fully discuss the charges to be addressed in the upcoming hearing. That evidentiary hearing was ultimately held on July 30, 1991.

Faulk was not suspended until after a full evidentiary hearing had been held. He was represented by counsel and had ample notice of the hearing and full opportunity to cross-examine his accusers. Faulk was allowed to and in fact did call witnesses on his own behalf. This evidentiary hearing more than satisfied the Constitutional Due Process requirements.

Faulk was made plainly aware of the complaint against him. He was afforded full opportunity to present his side of the issue. Only after a full evidentiary hearing that went above and beyond

constitutional requirements was he suspended for five days. The protections afforded Faulk were more than adequate for such minor sanctions.

Similarly, Faulk was afforded far more protection than required prior to his ten day suspension in 1992. That suspension arose from a parent's complaint that Faulk had slapped a student on his school bus. The School Board investigated that charge and ultimately decided to suspend Faulk for a period of ten days. On January 27, 1992, Faulk was given written notice of the complaint made against him. Once again, Faulk was represented by legal counsel throughout his process. Faulk's attorney made a written response to the charges on January 29, 1992. Faulk was therefore given notice and an opportunity to respond. Additionally, the School Board

conducted a full investigative hearing into the incident. At that hearing, Faulk was again represented by counsel. He had full opportunity to cross-examine his accusers and to present evidence on his own behalf. The committee ultimately recommended to the School Board that Faulk be suspended for ten days without pay, and the Board followed that recommendation.

Since it is clear that the appellant received both notice and an opportunity to respond to the charges against him before any deprivation or interruption in his right to continued employment occurred, we affirm the district court's judgment on this alleged point of error. It appears that Faulk is complaining about the result reached in those hearings, and for that La. Rev. Stat. 17:493(c) provides an adequate remedy of

review through the state court system. Because we find that the pre-deprivation due process was sufficient, we need not address the value of any post-deprivation remedies in light of the Parratt/Hudson doctrine.[2]

Dismissal of First Amendment Claim: Public Concern or Private Matter?

Appellants next contend that their First Amendment right to free speech was abridged because the defendants conduct

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[2] The Parratt/Hudson Doctrine provides that post-deprivation remedies are all the process that are due in certain instances "simply because they are the only remedies the state could be expected to provide." Zinermon v. Burch, 494 U.S. 113, 128 (1990). The underlying principle is that any proposed pre-deprivation safeguards would be of limited value in preventing the kind of deprivation at issue in the specific case. Id. at 129. Because the value of any pre-deprivation safeguard would be "negligible in preventing the kind of deprivation at issue," post-deprivation remedies are sufficient as a matter of law. Id.

discussed above was in retaliation of Faulk's speaking out against some questionable practices. More specifically, appellants contest the district court's finding that the speech in question did not involve matters of public concern.

The threshold legal question for a determination of a violation of a plaintiff's right to freedom of speech is whether the employee's speech dealt with matters of truly public concern opposed to matters of purely personal interests or inter-office disputes. Connick v. Myers, 461 U.S. 138, 146 (1983). Faulk claims that the public at large would have had an interest in knowing that the Vermilion Parish School Board was allegedly keeping certain bus drivers in the position of "substitutes" in contravention of the law. In Connick,

the Supreme Court rejected this argument and the Fifth Circuit as well has stated:

> Because almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in the role as an employee.

Caine v. Hardy, 943 F.2d 1406, 1416 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 1474 (1992).

Appellant clearly states that his remarks were made in the context of an employee of the Vermilion Parish School Board and as a representative of the Vermilion Parish Bus Drivers Association. As previously stated, the substitute drivers are not members of the Association.

A determination of "public concern" is a question of law to be resolved by the court. Connick, 461 U.S. at 148. This Court finds that Faulk's statements concerning the substitute drivers do not rise to the level of "public concern," as the speech in question was primarily concerned with Faulk's representation of the Vermilion Parish Bus Drivers' Association. Although, it may be inferred that the alleged retaliation by the School Board was directed at Faulk, as the Association's president, the statement about the substitutes was not sufficient to be deemed a matter of public concern. "Such a constitutionalization of primarily intra-office disputes would invite undesirable judicial interference into mundane government operations, however, with hardly even a marginal effect on the

vigorous debate of public issues secured by the First Amendment." Caine, 943 F.2d at 1416.

Therefore, we find that appellants' First Amendment freedom of speech rights were not violated by Dartez, the School Board Members, or Calvin Woodruff, as his statements were not of sufficient public concern to warrant constitutional protection.

Dismissal of Calvin Woodruff

Appellants finally assert that the district court committed error in dismissing Calvin Woodruff as a defendant. Appellants were allowed to amend their complaint to name Calvin Woodruff, attorney for the Vermilion Parish School Board and also an assistant district attorney for Vermilion Parish, as defendant. Plaintiffs' claim was based on a series of allegations, loosely

based on the theory that private parties may be held liable under section 1983 if "they willfully participate in joint action with state agents."

The district judge found that although the appellants made a number of allegations, they provided no documentation, affidavits, or deposition testimony to support the claims that defendant Woodruff willfully conspired with the School Board to violate plaintiffs' rights. We agree.

In opposing a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but by his response by affidavits or as otherwise provided in [Fed. R. Civ. P. 45], must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "On a motion for summary judgment, the

opponent bears the burden of establishing that there are genuine issues of material fact, and may not wait until trial or appeal to develop claims or defenses to the summary judgment motion." C. F. Dahlberg & Co., Inc. v. Chevron, USA, Inc., 836 F.2d 915, 920 (5th Cir. 1988). The appellants have failed to meet the burden of coming forward with "opposing affidavits or other competent evidence setting forth specific facts to show that there is a genuine issue of material fact for trial. Mere allegations are insufficient." United States v. An Article of Drug Consisting of 4,680 Pales, 725 F.2d 976, 985 (5th Cir. 1984).

Moreover, since we find no deprivation of any constitutional right to have occurred, Woodruff could not be guilty of willfully conspiring to violate plaintiffs' rights.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

FILED ON: APRIL 28, 1994

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

VERMILION PARISH BUS DRIVERS, ET AL	CIVIL ACTION
	NO: 92-0922
VERSUS	
	JUDGE DOHERTY
VERMILION PARISH SCHOOL BOARD, ET AL	MAGISTRATE TYNES

MEMORANDUM RULING

This matter comes before the Court by way of a February 2, 1993 motion by defendants in this matter to dismiss or in the alternative for summary judgment. On March 2, 1993 plaintiff filed a memorandum in opposition to defendants' motion; however, on March 3, 1993 this Court granted plaintiffs leave to supplement their original memorandum after the completion of discovery in this matter. Subsequent to the completion of discovery plaintiff filed a supplemental

memorandum to their original memorandum in opposition to defendants' motion and also submitted a motion by plaintiffs for summary judgment on the issue of liability. This Court subsequently requested the parties to submit a brief informing the Court of the status of suit filed in the 15th Judicial District Court, Parish of Vermilion, State of Louisiana, Docket No. 92-61485-B, entitled "Vermilion Parish Bus Drivers & Operators Association and Jeffrey J. Faulk, Sr. vs. Vermilion Parish School Board, et al." The Court was particularly interested in the substance of the action and reason for hearing before the Honorable Douglas J. Nehrbass on June 22, 1992.

This action is brought pursuant to 42 U.S.C. § 1983 and arises out of plaintiff's employment as a bus driver by

the Vermilion Parish School Board. The plaintiffs are the Vermilion Parish Bus Drivers & Operators Association and its President, Jeffrey J. Faulk, Sr. ("plaintiffs"), defendants are the Vermilion Parish School Board ("School Board"), its superintendent, Daniel R. Dartez ("Dartez") and its respective individual members, (Anthony J. Fontana, Jr., Kibbie P. Pillette, Hampton J. Primeaux, Cecil J. Hebert, Carroll E. LeBlanc, Herman J. Suire, Duffy G. Marceaux, Jr.) ("School Board Members"). Also made a defendant is the Vermilion Parish Assistant District Attorney and General Counsel for the School Board, Calvin Woodruff ("Woodruff"). Plaintiffs claim that Dartez, the School Board Members and Woodruff have violated their constitutional rights by virtue of certain actions allegedly taken by the

School Board concerning the employment and discipline of Mr. Faulk and the compensation of certain "substitute" bus drivers.

Applicable Law

The Civil Rights Act of 1871, 42 U.S.C. § 1983, is a procedural vehicle to recover for deprivations of rights established elsewhere in the law. San Jacinto Savings & Loan v. Kacal, 928 F.2d 697 (5th Cir. 1991). The statute states in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

> equity, or other proper proceeding for redress."

42 U.S.C. § 1983 (West 1981).

Therefore, in order to recover under § 1983, plaintiffs must prove that (1) the conduct occurred under the color of state law and (2) the conduct deprived the plaintiffs of a right, privilege or immunity secured by the Constitution or a law of the United States. Hernandez v. Maxwell, 905 F.2d 94 (5th Cir. 1990). The Supreme Court in numerous rulings has indicated that § 1983 is a means to redress Constitutional concerns and is not a remedy to what may be properly characterized as general tort law claims:

> "The Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplemental traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that 'would

> make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.'"

Daniels v. Williams, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed. 2d 662 (1986), quoting Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, (1976).

Plaintiff, Jeffrey J. Faulk, Sr., argues that he has a constitutionally-protected property interest in his right to unfettered continuance of his employment and receipt of his salary. Plaintiff states that his constitutionally-protected property interest arises from La. Rev. Stat. 17:492, which grants tenure to certain bus drivers. Mr. Faulk has driven a school bus in Vermilion Parish since 1967 and therefore, has been tenured for approximately 23 years. La. Rev. Stat. 17:492 states in pertinent part:

"Each school bus operator shall serve a probationary term of three (3) years reckoned from the date of his first employment in the parish in which the operator is serving his probation. During the probationary term the parish school board may dismiss or discharge any operator upon the written recommendation of the parish superintendent of schools accompanied by valid reasons therefore.

Any school bus driver found unsatisfactory by the parish school board at the expiration of the probationary term shall be notified in writing by the school board that he has been discharged or dismissed; in the absence of such notification such probationary school bus operator shall automatically become a regular and permanent operator in the employ of the school board of the parish in which he has successfully served his probationary term.
...

In order to acquire tenure under the provisions hereof, each school bus operator shall personally operate and drive the school bus he is employed to operate; no one shall acquire tenure in the operation of more than one school bus."

Plaintiff further states that this constitutionally-protected property interest includes being allowed to perform his duties without interruption or suspension, absent being found guilty by substantial evidence, after a hearing by the board and after receiving proper notice from the superintendent all in accordance with the state law governing removal of tenured bus drivers, La. Rev. Stat. 17:493. La. Rev. Stat. 17:493 states in pertinent part:

> a. A permanent school bus operator shall not be removed from his position except upon written and signed charged of willful neglect of duty, or incompetence, or immorality, or drunkenness while on duty, or physical disability to perform his duties, or failure to keep his transfer equipment in a safe, comfortable, and practical operating condition or of being a member or contributing to any group, organization, movement, or corporation that is prohibited by law or injunction from

operating in the State, and then only if found guilty after a hearing by the school board of the parish or city in which the school bus operator is employed....

b. All hearings hereunder shall be private or public, at the option of the operator affected thereby.... The operator affected shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder, the board shall have the power to issue subpoenas to compel the attendance of all witnesses on behalf of the operator. Nothing herein shall impair the right of appeal to a court of competent jurisdiction.

c. If a permanent school bus driver is found guilty by a school board, after due and legal hearing has provided herein, of charges of willful neglect of duty, or of incompetence, immorality, or drunkenness while on duty, or physical disability to perform his duties, or failure to keep his transfer equipment in a safe, comfortable, and practical operating condition, or being a member of or contributing to

> any group, organization, movement or corporation that is prohibited by law or injunction from operating in the state, and ordered removed from office, or disciplined by the board, the superintendent with approval of the board shall furnish to the school bus operator a written statement of recommendation of removal or discipline, which shall include but not be limited to the exact reason, offense or instance upon which the recommendation is based. Such operator may, not more than one (1) year from the date of said finding, petition of court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the matter. If the finding of the school board is reversed by the court and the operator is ordered reinstated and restored to duty, the operator shall be entitled to full pay for any loss of time or salary he may have sustained by reasons of the action of said school board.

Plaintiff alleges that he has both a procedural and a substantive Due Process right arising from his interest in his

continued employment, which includes being able to perform his duties without an interruption or suspensions unless proper procedures pursuant to the Louisiana Tenure Statute are followed. Further, plaintiff alleges that Dartez, the School Board Members and Woodruff decided to "get him" in retaliation for Mr. Faulk's threatened statements to the public that the practice of the School Board of keeping certain drivers in the position of "substitute" was against the law. Plaintiff alleges that his right to freedom of speech, as protected by the First Amendment, and as set forth in Pickering v. Board of Education, 391 U.S. 593, 88 S.Ct. 1731, 201 L.Ed.2d 811 (1968), was abridged by Dartez, the School Board Members and Woodruff pursuant to the board's adverse actions toward him.

As detailed below, plaintiff, Jeffrey Faulk, was involved in two incidents, one involving a bus accident and the other the discipline of a student. The School Board, after what they allege were proper proceedings, disciplined Mr. Faulk. Subsequently, Mr. Faulk failed to obey the board's second suspension order, and the board initially began the process of preparing to conduct an insubordination hearing, which ultimately did not come to fruition.

Plaintiff claims that prior to this time he had not experienced any problems with the School Board or any of its members, and his problems began when he threatened to speak out regarding the School Board's alleged violation of the law, concerning employment of "substitute" bus drivers beyond a 90 day period. "Since that time his problems

with the board have multiplied." (Plaintiff's Memorandum in Opposition, page 7).

Mr. Faulk alleges in his argument that the basic violations of his procedural Due Process rights occurred subsequent to what will be described as Incidents 1 and 3, below. Subsequently two (2) disciplinary actions were allegedly instituted by defendants against plaintiff, Jeffrey Faulk, which Mr. Faulk claims were inconsistent with the requirements of Louisiana's tenure laws, La. Rev. Stat. 17:492 and 493. These principal actions resulted in two (2) suspensions of Mr. Faulk by the School Board Members.

The complaint enumerates eight (8) separate incidents which plaintiffs contend have violated or contributed to a violation of their constitutional rights.

Plaintiffs' response and motion for summary judgment lists six (6) separate areas of claims which will be addressed by this Court.

Incidents

Incident Number 1, as described in paragraphs 15 through 26 of the complaint, involved an accident between Mr. Faulk's bus and a farm truck on May 1, 1991. Subsequent to a hearing before the Board on July 30, 1991, Mr. Faulk was found guilty of willful neglect of duty and suspended without pay for five (5) days. (Defendants' Exhibits J, K, L).

Incident Number 3, as described in paragraphs 33 through 45 of plaintiff's complaint, involved a complaint by a parent that Mr. Faulk had slapped a student on his school bus. Subsequent to

Incident Number 3, Mr. Faulk was suspended by the Vermilion Parish School Board, effective April 27, 1992. On the first day of the suspension, Mr. Faulk drove his bus route. This activity ceased when a letter was delivered to him forbidding entry on school property during the term of the suspension. As a result of Mr. Faulk's behavior on the first day of his suspension, insubordination charges were brought against Mr. Faulk. No hearing has been held on these charges. (Defendants' Exhibit U, Affidavit of Superintendent Daniel Dartez).

Plaintiff has also alleged other instances, Incidents 2, 4 and 7, wherein Dartez, the School Board Members and Woodruff have sought to "punish" him, allegedly for threatening to speak out about the "substitute" bus driver policy, allegedly employed by the School Board.

Plaintiff Faulk does not claim that these incidents, i.e., Incident Numbers 2, 4, and 7, standing alone, rise to a constitutional violation of his civil rights, however, plaintiff claims that they are representative of a "patter" of the School Board Members in retaliation for his actions.

Incident Number 2, as described in paragraphs 27 through 32 of plaintiff's complaint, involve a modification of plaintiff's bus route. Mr. Faulk alleges that the School Board violated state school policy, namely Bulletins 1191 and 1475 (revised), when they required Mr. Faulk to drop off children on the way out of a dead end street, instead of on the way into the dead end street.

Incident Number 4, involves the School Board policy concerning the interplay between extra compensation

earned by drivers for extracurricular activities and drivers' "personal leave" as granted in the bus drivers' contract, Article 10.2(a). Plaintiff claims bus drivers should not take "sick days," if in fact they are not sick, as this practice harms the drivers and the bus drivers' association.

Incident Number 7, as described in paragraphs 52 through 54 of plaintiff's complaint, involves the Vermilion Parish School Board's request for reimbursement for professional leave days in violation of the School Board's policy. (Defendants' Exhibit Y). Plaintiffs claim that this is another example of the School Board's harassment of Mr. Faulk for his statements concerning the "substitute" bus driver policy.

The remaining three claims, Incidents 5, 6 and 8, will also be

separately addressed below, however, they will be dismissed by the Court as each fails to meet the requirements for a claim pursuant to 42 U.S.C. § 1983.

Incident Number 5, as described in paragraphs 41 through 51, involved the allegations in plaintiff's complaint that the Vermilion Parish School Board failed to negotiate a new contract in good faith with the Vermilion Parish Bus Drivers' Association. Plaintiff states no factual basis for the School Board's alleged failure to negotiate in good faith with the Vermilion Parish Bus Drivers. Furthermore, plaintiff has stated no basis, in law, which the alleged failure of the School Board to negotiate a contract would constitute a violation of a constitutional right granted to plaintiff. Therefore, plaintiff's claim based on Incident Number 5 is hereby DISMISSED.

Incident Number 6, involves plaintiff's claims that the Vermilion Parish School Board is allegedly violating La. Rev. Stat. 17:500, by keeping substitute drivers on the payroll longer than a 90 day period. Plaintiff does not claim this issue represents a violation of a federal right, but again, that it represents a pattern of activities, engaged in by the Vermilion Parish School Board, which taken as a whole violates plaintiff's constitutional rights.

As properly stated by the defendant, Jeffrey Faulk is not a "substitute driver" and no "substitute drivers" are members of the Vermilion Parish Bus Drivers Association. Therefore, there is no standing to sue by either Faulk or the Association to bring this claim, if in fact plaintiff is making a claim under this incident.

Further, plaintiffs have presented no evidence or made any allegations that the Vermilion Parish School Board's handling of "substitute" drivers diminishes the Vermilion Parish Bus Drivers Association members' property rights or violates any other alleged constitutional right. Plaintiffs submitted no evidence to the Court on either of these issues. Defendants have made a prima facie case and therefore plaintiffs cannot rest on "bald assertion alone." Fed. R. Civ. Pro. 56(e). Accordingly, plaintiff's claims based on Incident Number 6 are hereby DISMISSED.

Incident Number 8, plaintiffs' complaint in paragraphs 55 through 56, alleges that the Vermilion Parish School Board discriminated against Nathan Levy, because of his race. Plaintiffs do not address the claim alleged on behalf of

Mr. Levy, in their motion in opposition. Based on defendants' assertion, and plaintiffs' failure to meet defendants' argument, this Court DISMISSES plaintiffs' claims based on Incident Number 8.

Before addressing plaintiff's remaining claims, at this juncture the Court will address the claims by plaintiff against Vermilion Parish School Board Attorney Calvin Woodruff.

Plaintiffs were allowed to amend their complaint to name Calvin Woodruff, attorney for the Vermilion Parish School Board and also an assistant district attorney for Vermilion Parish, as defendant. Plaintiffs' claim was based on a series of allegations, loosely based on the theory that private parties may be held liable under § 1983 if "they willfully participate in joint action

with state agents" and the allegations contained in plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, pages 23 through 25.

Defendants correctly state that the Court cautioned plaintiffs' counsel at the time plaintiffs were allowed to amend the complaint to name Mr. Woodruff, that it "questioned whether the ends of justice would be served by allowing plaintiffs' amendment." Minute Entry dated August 12, 1992. The Court further cautioned plaintiffs that if discovery revealed no basis for the amendment to name Mr. Woodruff, the Court would entertain a motion for Rule 11 sanctions against plaintiffs' counsel.

Although plaintiffs have made a number of allegations ; the record does not reflect <u>any support</u> for plaintiffs' claims that defendant Woodruff conspired

with the School Board to violate plaintiffs' rights. Plaintiffs have provided no documentation, affidavits, deposition testimony, etc., to support their claims against Mr. Woodruff.

In opposing a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but by his response by affidavits or as otherwise provided in [Fed. R. Civ. Pro. 56], must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. Pro. 56(e). "On a motion for summary judgment, the opponent bears the burden of establishing that there are genuine issues of material fact, and may not wait until trial or appeal to develop claims or defenses to the summary judgment motion." C. F. Dahlberg & Co., Inc. v. Chevron, USA, Inc., 836 F.2d 915, 920

(5th Cir. 1988). Plaintiffs have failed to meet his burden of coming forward with "opposing affidavits or other competent evidence setting forth specific facts to show that there is a genuine issue of material fact for trial. Mere allegations are insufficient." United States v. An Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 985 (5th Cir. 1984).

As plaintiffs have failed to produce any affidavits or other competent evidence in support of their claims against defendant Woodruff, plaintiffs' claims against defendant, Calvin Woodruff, are DISMISSED. As this court cautioned plaintiffs' counsel at the time of the amendment, as to the necessity of naming, in this suit counsel for the Vermilion Parish School Board, the Court will entertain a motion by counsel for Mr. Woodruff for attorney's fees for the

prevailing party pursuant to 42 U.S.C. § 1988 and a motion for Rule 11 sanctions against plaintiff's counsel.

Plaintiff, Mr. Faulk, next argues, as previously stated, that he is a tenured school bus driver and as such has a constitutionally protected property interest in his tenured position as a school bus driver for the Vermilion Parish School Board, pursuant to La. Rev. Stat. 17:492, with procedures governing his discipline and removal provided in La. Rev. Stat. 17:493.

Browning v. City of Odessa, Texas, 990 F.2d 842 (5th Cir. 1993), provides the basis for plaintiff's procedural Due Process claim and states as follows:

> The United States Supreme Court decided in Cleveland Bd. of Educ. v. Loudermill, that if a governmental employer provides a full post-termination hearing, pre-termination due process is limited. 470 U.S.

> 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985). In such circumstances, before dismissing an employee, the employer need only provide the employee with written or oral notice of the charges raised against him, explain to the employee the nature of the evidence of those charges, and afford the employee the opportunity to respond. Id. Helton v. Clements, 832 F.2d 332, 337 (5th Cir. 1987); and Schaper v. City of Huntsville, 813 F.2d 709, 714 (5th Cir. 1987).

A satisfactory pre-termination "hearing" need not be elaborate, for such a hearing is merely designed to prevent the employer from making a mistake. Loudermill, 470 U.S. at 545, 105 S.Ct. at 1495. The purpose of the hearing is simply to ensure that the charges raised against the employee are true and support his or her dismissal. Id. Thus, an informal hearing which allowed the employee to given his version of the facts sufficiently hedges against an

erroneous dismissal and likewise satisfies the requirements of Due Process. Id. at 546, n. 8, 105 S.Ct. at 495, n. 8; Caine v. Hardy, 943 F.2d 1406, (5th Cir. 1991) cert. denied, 111 S.Ct. 1474, (1992).

Mr. Faulk claims that the defendants, the School Board Members, Dartez and Woodruff, failed to sufficiently follow the requisite procedures as provided by La. Rev. Stat. 17:493 and therefore he was denied Due Process prior to the two (2) suspensions, which were imposed by the School Boards. Said suspension were for Incidents Numbers 1 and 3, the bus accident and the alleged slapping of a student on his bus. Mr. Faulk seeks to have this Court review both disciplinary hearings held by the School Board to assess the procedural mechanisms used by the Board in relation

to La. Rev. Stat. 17:493. It appears, however, that Mr. Faulk has failed to take advantage of his statutorily granted post deprivation remedy, an appeal to the state district court. Therefore, this Court's review of the School Board procedures will be precluded for the following reasons.

This Court notes that La. Rev. Stat. 17:493 provides for a pre-deprivation hearing and also provides for a post-deprivation remedy in Section C which states as follows:

> Such operator may, not more than one (1) year from the date of such finding, petition a court of competent jurisdiction for a full hearing to review of the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the matter. If the finding of the school board is reversed by the court and the operator is ordered reinstated and restored to duty, the operator shall be

> entitled to full pay for any loss of time or salary he may have sustained by reason of the action of the said school board.

This Court notes that this right includes a bus driver who has been "disciplined by the board." La. Rev. Stat. 17:493.

The Fifth Circuit has repeatedly held, in rejecting procedural Due Process claims, that "an employee cannot ignore the process duly extended to him and later complain that he was not accorded Due Process." Galloway v. The State of Louisiana, 817 F.2d 1154 (5th Cir. 1987). In Pope v. Miss. Real Estate Commission, 872 F.2d 127 (5th Cir. 1989), the Fifth Circuit refused to hearing plaintiff's procedural due process claim and stated: "We rebuffed a challenge to rulings or interpretations of the Commission's regulations, where the plaintiff had

sought no administrative or state court remedy that was statutorily available."

Plaintiffs have presently pending in the 15th Judi[illegible]l District Court, State of Louisiana, an identical case entitled "Vermilion Parish Bus Drivers & Operators Association and Jeffrey J. Faulk, Sr. vs. Vermilion Parish School Board, et al." Plaintiffs state, that the present suit pending before the 15th Judicial District Court is not an appeal of the previous school board rulings, but instead only a suit for injunction to enjoin the School Board from any further disciplinary procedures against Mr. Faulk for the alleged insubordination in connection with his second suspension. Plaintiffs state:

> In essence, the sole question before Judge Nehrbass was whether the school board dotted its "i's" and crossed its "t's" and jumped through all the hoops the legislature has set before it, before it can take

> any further disciplinary action against plaintiff. No consideration of any other matters at issue in the suit currently pending before this Honorable Court were at issue in the injunction action, and it is expected that there will have been no such consideration made when a decision is rendered some time in September, as indicated by Judge Ware who presided at the hearing.

Plaintiff's motion for a preliminary injunction was heard by the Honorable Bradford Ware in the 15th Judicial District Court on July 27, 1993, and was taken under advisement. Plaintiff, as stated, has not made any claim for redress of the disciplinary or other administrative applications which have singled him out for "punishment" for his threatened remarks about "substitute" bus drivers. This Court also notes that plaintiff attempted to have this Court enjoin the School Board from further

disciplinary action against Mr. Faulk, which was denied.

Plaintiff has failed to avail himself of a statutorily granted remedy, hearing in state district court, for a post-deprivation review of the Board's decisions. Therefore, this Court is precluded from a review of plaintiff's claims that defendants failed to follow proper procedures in his pre-deprivation hearings.

Notwithstanding, plaintiff's failure to avail himself of his post-deprivation remedy, this Court will address whether plaintiff could have stated a claim for a violation of procedural Due Process, had he availed himself of his post-deprivation remedy. As plaintiff had a statutorily granted post-deprivation review and remedy, this case falls within the purview of the Parratt/Hudson doctrine,

which provides that a "random unauthorized 'deprivation' would not violate procedural Due Process if the state furnished an adequate post-deprivation remedy." Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), citing Parratt v. Taylor, 451 U.S. 527, 539, 101 S.Ct. 1908, 1915, 68 L.Ed.2d 420 (1981) and Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

At this point in the analysis, it is important to clarify that plaintiff Faulk has not challenged the sufficiency of the statutorily-defined procedures which the Board must follow in disciplining its employees. Rather, Faulk claims that the Board misused the procedures by invoking them for improper reasons and applying them in a biased fashion. This challenge is similar to that posed by the

plaintiff in Caine v. Hardy, 943 F.2d 1406, 1411-15 (5th Cir. 1991).[1]

Zinermon, which the Fifth Circuit has noted in Caine, supra, has placed a "wrinkle" on the Parratt/Hudson doctrine, which now requires a case by case analysis by the Court for the application of Parratt/Hudson to plaintiff's claim. Zinermon requires three (3) pre-conditions for the application of the Parratt/Hudson doctrine which are:

1. The deprivation must truly have been unpredictable or unforeseeable;

---

[1] The opinion in Caine did address, indirectly, the issue of whether the state's decision not to provide pre-deprivation process to the plaintiff doctor complied with the Fourteenth Amendment. There is no need for this Court to concern itself with that issue; however, because plaintiff Faulk clearly was entitled to and did receive pre-deprivation process and, as noted above, plaintiffs have no raised any issue as to the sufficiency of the state-defined procedures for disciplining employees.

2. The pre-deprivation procedures must have been impotent to counter the state actors' particular conduct; and

3. The conduct must have been "unauthorized" in the sense that it was not within the official's expressed or implied authority.

Caine, supra at 1413.

Plaintiff states that his problems with the Vermilion Parish School Board began when the "Vermilion Parish School Board and several of its individual members -- were 'out to get' plaintiff, Jeffrey J. Faulk, Sr., because of Mr. Faulk's vocalized intent to expose the illegal practices of the Board with regard to 'substitute' bus drivers." Plaintiff's Memorandum in Opposition, at 1. The analysis pursuant to Zinermon will address plaintiff's claims with regard to Incidents 1 and 3.

First, while suspension of Mr. Faulk for the May 1, 1991 accident might have

been foreseeable, defendants' decision to suspend him in violation of the tenure laws, as in Caine, a willful violation of procedure by an entire School Board, was certainly not foreseeable. Therefore, the first prong of the pre-conditions of Zinermon is similarly met herein.

Second, plaintiff claims that the pre-deprivation hearing was "impotent to counter the state actors' particular conduct," i.e., that the School Board members, including its' counsel, Calvin Woodruff, were conspiring to "get" plaintiff because of his statements. Again, the facts are similar to the situation in Caine, if, as plaintiff alleges, the School Board would have violated any procedures set out by the State if, as plaintiff alleges, to "get him" was their aim. Therefore, the second prong of the Zinermon condition applies.

Third, based on Mr. Faulk's claims, the Vermilion Parish School Board's actions could certainly not be characterized as "authorized", if in fact the regulations were used to discipline Mr. Faulk for inappropriate reasons. Once more, these allegations are similar to those in Caine v. Hardy; as in that case, this court finds that the board could not have been authorized to misuse the procedures in such a fashion. Therefore, the third precondition to applying Parratt/Hudson is also met herein.

Therefore, the application of the Parratt/Hudson doctrine, as defined by Zinermon, is appropriate in this matter. Based on plaintiff's conclusionary allegations, any deprivation of Due Process suffered by plaintiff was "random and unauthorized." Moreover, there was in place a statutorily granted post-

deprivation remedy providing for judicial review of the Vermilion Parish School Board's actions, with language specifically providing review and a remedy. Accordingly, pursuant to Parratt/Hudson, with the Zinermon "wrinkle", Mr. Faulk does not have a claim for a violation of the Fourteenth Amendment guarantee of procedural Due Process as there was in place a statutorily defined post-deprivation remedy.

Plaintiff further claims he has a substantive Due Process claim arising from his interest in continued employment. The fifth Circuit has held that a "public employee has a 'substantive' Due Process right by virtue of his state property interest in continued employment." Russell v. Harrison, 736 F.2d 283, 288 (5th Cir. 1984); Schaper, 813 F.2d at 717.

As the Fifth Circuit has granted Mr. Faulk a substantive Due Process right, this Court will now determine if plaintiff can claim a violation of that right at the pre-termination state, as it is clear that plaintiff is still presently employed by the Vermilion Parish School Board.

As previously discussed, the Parratt/Hudson doctrine is defined as a "deprivation resulting from a 'random and unauthorized act' of a state official which does not violate Due Process when the state provides an adequate post-deprivation remedy." Schaper at 717. "When a deprivation results from random and unauthorized conduct that is not amenable to any pre-deprivation check, what process is due cannot be assessed until available post-deprivation remedies have been exhausted." Schaper at 717.

Parratt/Hudson doctrine does not necessarily apply to all substantive Due Process claims, for example, in the instance where a "plaintiff alleges that the state action also violated an independent substantive right, and further asserts that the action itself was unconstitutional, his rights will be violated no matter what process precedes, accompanies, or follows the unconstitutional action." Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984), Schaper, supra at 717.

Mr. Faulk also alleges that he threatened to speak about the Vermilion Parish School Board's alleged practice of keeping certain drivers in the position of "substitute" and asserted that practice was against the law. In order to retaliate and silence Mr. Faulk, he claims the School Board imposed various

disciplinary actions, which were previously detailed in Incidents 2, 4 and 7, in violation of his First Amendment right to free speech.

Mr. Faulk claims the "message was given to the Board members by Mr. Faulk as a part of his representation of the members of the Bus Drivers' Association, in an attempt to receive fair treatment for all bus drivers and in an attempt to have the school board comply with the law."

Caine, supra states the standard for a determination of a violation of plaintiff's right to freedom of speech, as follows:

> Public employees do not, by virtue of their positions, shed the First Amendment rights to speak out on matters of public concern. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

> The Threshold legal question in such cases is whether the employee's speech dealt with matters of truly public concern opposed to matters of purely personal interests of inter-office disputes. Connick v. Myers, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983).
>
> It cannot be denied that the context in which public employees expresses himself may be relevant to determining whether the speech expressed a matter of "public concern." Noyola v. Texas Dept. of Human Resources, 846 F.2d 1021, 1023 (5th Cir. 1988).

However, as stated in Caine, supra, "but context alone cannot transform an inherently self-interested opinion into one that implicates public issues." Caine at 1416.

Plaintiff, Mr. Faulk, claims that the public at large would have had an interest in knowing that the Vermilion Parish School Board was allegedly keeping certain bus drivers in the position of

"substitutes" in contravention of the law. In Connick, supra, the Supreme Court rejected this argument and the Fifth Circuit as well has stated:

> Because almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in the role as an employee.

Caine, supra at 1416, citing Terrell v. Univ. of Tex. System Police, 792 F.2d 1360, (5th Cir. 1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948 (1987).

Plaintiff clearly states that his remarks were made in the context of an employee of the Vermilion Parish School Board and as a representative of the Vermilion Parish Bus Drivers Association. As previously stated, the "substitute"

drivers are not members of the Association.

A determination of "public concern" is a question of law to be resolved by the court. Connick 461 U.S. at 148, n.7, 103 S.Ct. at 1690 n.7; Click v. Copeland, 970 F.2d 106 (5th Cir. 1992). This Court finds that Mr. Faulk's statements concerning the "substitute" drivers do not rise to the level of "public concern," as the speech in question was primarily concerned with Mr. Faulk's representation of the Vermilion Parish Bus Drivers' Association. Although, it may be inferred that the alleged retaliation by the School Board was directed at Mr. Faulk, as the Association's president, the statement about the "substitutes" was not sufficient to be deemed a matter of public concern.

The Fifth Circuit stated in Caine: "Such a constitutionalization of primarily intra-office disputes would invite undesirable judicial interference into mundane government operations, however, with hardly even a marginal effect on the vigorous debate of public issues secured by the First Amendment." Caine, supra, at 1416.

Therefore, this Court finds that plaintiff's First Amendment freedom of speech rights were not violated by Dartez, the School Board Members, or Calvin Woodruff, as his statements were not of sufficient public concern to warrant constitutional protection.

Plaintiff's substantive right to continued employment comes from state law, i.e., La. Rev. Stat. 17:493. As stated, this Court found plaintiff has no independent claim for a violation of his

First Amendment freedom of speech. Furthermore, plaintiff's substantive Due Process claim as made merely restates plaintiff's procedural Due Process claim of a right to continued employment with the School Board. Therefore, it would serve no purpose to allow Mr. Faulk to circumvent the bar to a procedural Due Process claim, as stated by the Parratt/ Hudson doctrine, and allow him to maintain a substantive Due Process claim, based on the same actions by state officials and his claim to the right to continued employment. Underlying this Court's finding is the language of Schaper, supra at 718, which provides that in light of Parratt/Hudson this Court cannot "allow plaintiff to challenge the deprivation of a property interest on the ground that it resulted from arbitrary and capricious state

action, while under Parratt/Hudson he would not be able to state a claim for a deprivation of the same right on the ground that it resulted from a random and unauthorized act of a state official.

Therefore, plaintiff has not presented evidence to meet defendants' evidence that plaintiff has no substantive Due Process for an alleged violation of the School Board, Dartez or Calvin Woodruff and as a result plaintiff's claim for a substantive Due Process violation is hereby DISMISSED.

Considering the foregoing, this Court will GRANT the motion for summary judgment filed on behalf of defendants, Vermilion Parish School Board, its superintendent, Daniel Dartez and its individual members, (Anthony J. Fontana, Jr., Kibbie P. Pillette, Hampton J. Primeaux, Cecil J. Hebert, Carroll E.

LeBlanc, Herman J. Suire, Duffy G. Marceaux, Jr.) ("School Board Members") and Vermilion Parish Assistant District Attorney and General Counsel for the School Board, Calvin Woodruff.

THUS DONE AND SIGNED in chambers this 30 day of September, 1993 at Lafayette, Louisiana.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

FILED ON: SEPTEMBER 30, 1993

Supreme Court, U.S.
FILED

94 332 AUG 22 1994

NO. _____

OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

OCTOBER, 1994, TERM

VERMILION PARISH BUS DRIVERS AND
OPERATORS ASSOCIATION and
JEFFREY J. FAULK, SR.,
Petitioners

VERSUS

VERMILION PARISH SCHOOL BOARD, ET AL,
Respondents

ON PETITION FOR WRITS OF CERTIORARI AND
MANDAMUS TO THE UNITED STATES COURT
OF APPEALS, FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRITS OF CERTIORARI AND MANDAMUS VOLUME II OF II

J. MINOS SIMON
1408 West Pinhook Road
Post Office Box 52116
Lafayette, LA 70505-2116
Telephone: (318) 233-4625

Attorney for Petitioners

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

VERMILION PARISH BUS DRIVERS, ET AL	:	CIVIL ACTION NUMBER: 92-0922
VERSUS	:	JUDGE DOHERTY
VERMILION PARISH SCHOOL BOARD, ET AL	:	MAGISTRATE JUDGE TYNES

O R D E R

Considering the foregoing memorandum ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion for summary judgment filed on behalf of defendants, Vermilion Parish School Board, its superintendent, Daniel Dartez and its individual members, (Anthony J. Fontana, Jr., Kibbie P. Pillette, Hampton J. Primeaux, Cecil J. Hebert, Carroll E. LeBlanc, Herman J. Suire, Duffy G. Marceaux, Jr.) ("School Board Members")

and Vermilion Parish Assistant District Attorney and General Counsel for the School Board, Calvin Woodruff is hereby GRANTED.

Lafayette, Louisiana this 30 day of September, 1993.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

FILED ON: SEPTEMBER 30, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5434

VERMILION PARISH BUS DRIVERS
AND OPERATORS ASSOCIATION, ET AL.,

Plaintiffs-Appellants.

versus

SCHOOL BOARD VERMILION PARISH, ET AL.,

Defendants-Appellees.

Appeal from the United States District
Court for the Western District
of Louisiana

ON PETITION FOR REHEARING

(May 26, 1994)

Before REYNALDO G. GARZA, DUHE' and

EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza
United States Circuit Judge

FILED ON: MAY 26, 1994

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

VERMILION PARISH BUS DRIVERS AND OPERATORS ASSOCIATION and JEFFREY J. FAULK, SR.	:	**DOCKET NUMBER CV92-0922**
	:	**DIVISION "L-O"**
VERSUS	:	**JUDGE DOHERTY**
VERMILION PARISH SCHOOL BOARD, ET AL	:	**MAGISTRATE JUDGE TYNES**

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned Notary Public in and for the aforesaid Parish and State, personally came and appeared

JEFFREY J. FAULK, SR.

who, after being duly sworn, did depose and state as follows:

1. He one of the plaintiffs in the above captioned lawsuit.

2. He is the president of the Vermilion Parish Bus Drivers and Operators Association and the Louisiana School Bus Operators Association.

3. He has been employed as a school bus operator in Vermilion Parish since 1967 and is currently so employed.

4. He serves as an ex-officio member of the Board of Trustees of the Louisiana School Employees' Retirement System.

5. At the meeting of the Vermilion Parish School Board, when the board voted to have all employees sign in each day when they got to work, including bus drivers, he told the Board that if the bus drivers had to follow the law by signing in, they (the School Board) had to follow the law by not having "substitute" bus drivers who were not really substitutes; he told them that

they had a "substitute" driver who had been driving for two years, and that the law required that the driver be hired permanently after driving for ninety days; that they were getting away with paying that driver sixty-five (65%) percent of a regular driver's pay, and that he would see to it that the driver would be hired permanently, as the law provides.

6. A few days after the bus accident of May 1, 1991, during a meeting between himself, Cecil Hebert and Daniel Dartez, Cecil Hebert told him that he (Hebert) would support him concerning the bus accident, but that the other board members wouldn't because they were "pissed off" at him because he had told them that if the bus drivers had to follow the law by signing in, the School Board had to follow the law by not having

"substitute" bus drivers who were not really substitutes.

7. Before this incident where he told the board he would see to it that they follow the law, his relationship with the board had been good; he had never had problems with the board since he began driving in 1967.

8. He believes that the problems which arose after he told the board he would see to it that they follow the law, (which are complained of in this lawsuit), were strictly as a result of the board members being mad at him.

9. He believes that the board members also wanted to weaken the bus drivers association, and that one way to do that was to get rid of him.

10. He has never willfully neglected his duties or demonstrated any incompetence whatsoever as a bus driver.

11. The Board did not make available to him any policy, regulation or rule requiring a bus driver to summon the police to the scene of an accident with no injuries and no apparent damage of less than $100.00, or to notify his principal/supervisor of such an accident from the scene.

12. No principal or supervisor ever provided him a handbook of school rules, regulations and procedures.

13. He is aware of no state law requiring a driver to give notice of an accident to the police from the scene, if the accident does not involve injury to any person or if property damage does not appear to exceed one hundred dollars.

14. He twice asked the students on his bus if they were hurt before he departed the bus to talk with the driver of the other vehicle involved in the

accident on May 1, 1991 and twice the students told him they were not not hurt; when he re-boarded his bus, he asked the students again if anyone was hurt and they again told him they were not hurt.

15. His bus was not damaged in the May 1, 1991 accident, and the only apparent damage to the other vehicle was a bent bumper, which he and the other driver believed did not exceed one hundred dollars.

16. His former counsel, Howard Martin, showed him the letter from Marcus Broussard dated July 3, 1991, (Exhibit F), stating that the Board had not voted to bring any charges, nor met to hear or consider the charges.

17. On May 1, 1991 at approximately 4:00 p.m., he notified his supervisor of the bus accident that occurred on May 1, 1991 at approximately 3:35 p.m.; he met

with school board member Anthony Fontana on May 2, 1991 at approx. 9:00 a.m. and spoke about the accident, notified the Abbeville police department of same on May 2, 1991 at approximately 10:35 a.m., then delivered a report from the police department to the superintendent on May 1, 1991 and to his insurance agent.

18. During his more than twenty years of driving school buses, he has always had bus stops at which children would have to cross the street prior to boarding and after departing the bus; it has always been his practice as a bus driver to treat all children alike, even when planning the location of bus stops on his route.

19. On or about January 24, 1992, three students on his bus were acting up and "barking;" because they had previously gotten into trouble on his

bus, the three students had been assigned the first seat behind the driver; he stopped his bus, stood up and addressed the three students and ordered them to stop barking and to sit down and shut up; he returned to his seat and continued driving his route; at no time did he physically touch or strike any student.

20. The board failed to notify and meet with the bus drivers Association, and failed to explain and discuss policy GAAAQ regarding investigation of charges of corporal punishment.

21. After a hearing by the investigative committee, including Daniel Dartez, Cliff Allemann and Linda Guidry, he, the committee members, Isaac J. Funderburk, and Calvin Woodruff boarded Faulk's school bus; Woodruff sat in the driver's seat and Funderburk sat in the first seat behind the driver's seat;

Woodruff attempted to "backhand" Funderburk just as one of the students testified that Faulk had done; Woodruff was unable to reach or touch Funderburk; the demonstration proved that the student's testimony was false.

22. On March 19, 1992 at the meeting of the board, he requested that the board's discussion of his character and competence be in open session.

23. He was present in court in Abbeville, Louisiana when Calvin Woodruff told Judge Nehrbass that during the reinactment referred to above, he sat in the driver's seat and "backhanded Mr. Funderburk right across his face in the course of that demonstration."

24. His former counsel, Isaac J. Funderburk, gave him a copy of a letter written by superintendent Dartez on April 2, 1992, (Exhibit L), approving his

professional leave and acknowledging that he would be out of town from April 2-10, 1992.

25. In a meeting with superintendent Dartez, with regard to professional leave, Dartez instructed him to meet with his principal at his base school and notify the principal when professional leave had to be taken, and to have his substitute driver write by his name "professional leave;" that the board had never asked him for reimbursement for substitute drivers prior to Karl Bruchhaus' letter dated March 31, 1992. (Exhibit Q).

26. When superintendent Dartez approved his leave for April 2-10, 1992, he informed him that he would have to pay his own substitute out of his own pocket; however, after paying his substitute, Maxine Hebert, $218.00, the board paid

the substitute $232.76, whereupon Mrs. Hebert refunded the $218.00 to Faulk. (Copies of these checks are attached hereto as Exhibits R and S).

27. Ever since the events described in no. 25 and 26 above occurred, the Board has paid his substitute while he was on professional leave, and has not requested reimbursement from Faulk.

28. The Board pays substitute drivers sixty-five (65%) percent of a regular driver's salary; prior to be the filing of this lawsuit, some drivers were being paid as substitutes although they were not "substituting" for any regular driver.

29. Since this lawsuit was filed, the Board stopped its practice of keeping certain drivers on as "substitutes," and let those drivers go; as a result, some routes were changed and consolidated.

30. Some bus routes in Vermilion Parish are now overloaded, including Faulk's route, with more students on a bus than allowed by law; some days he carries 78 students on his bus.

31. Before re-routing or changing drivers' routes, the law requires that those routes be opened and offered to the most tenured driver; after this lawsuit was field, Faulk's route was changed so that his bus is now overloaded and he drives a less desireable route, although he is one of the most tenured drivers in Vermilion Parish.

32. Some drivers have been required to sign a sheet that said they were applying for sick leave, after they had driver for an extra-curricular trip, and even though they were not actually sick; those drivers' accrued sick leave time was substracted from those drivers.

33. By letter dated March 5, 1992 (Exhibit O), he notified superintendent Dartez of his desire to open negotiations for a successor contract to the contract expiring June 30, 1992.

34. By letter dated May 12, 1992 (Exhibit O), he notified superintendent Dartez a second time that the bus drivers association wished to negotiate a new contract.

35. He, as the official representative of the bus drivers association, was not notified by the board of any negotiations for a successor contract; he was told informally by the VAE representative that a meeting was scheduled the evening of March 19, 1992 to negotiate the teacher's and employees' contract, and he went to the meeting briefly but could not stay for the duration of the meeting, nor had

he been formally invited to participate in the meeting.

36. Ratification of the extension agreement of the teachers' and employees' contract was not on the Board's agenda fro the May 12, 1992 meeting, however the Board moved to ratify the agreement; several bus drivers who were in attendance at the meeting voiced opposition to the Board's proposed action and the motion was tabled until the next meeting; the Board ratified the teachers' extension agreement at its next meeting; the only "negotiations" with the bus drivers consisted of a few phone calls.

37. The Board did not engage in good faith negotiations, but insisted that the bus drivers take the same agreement as the teachers, or nothing at all; the bus drivers' contract expired without a successor contract and the bus

drivers are presently working without a contract.

38. The property committee of the Vermilion Parish School Board told him he could put a video camera on his bus if it was not against any policy of the BESE board.

39. Certain BESE board members told him that they had no policy against installing video cameras on school buses.

40. He owns his owns school bus.

41. He bought and installed a video camera on his bus after speaking with the property committee and BESE board members.

42. He read in the paper that the property committee was going to direct him to remove the video camera from his bus; he also received a letter from the assistant superintendent directing him to remove the camera.

43. He was out of town on approved professional leave when his bus was boarded and inspected by Diana Duhon and Clifton Alleman.

44. He went to the school board office and asked for a copy of any performance evaluation that had been put into his personnel file, and was given a copy of an unsatisfactory evaluation pursuant to Duhon's and Alleman's surprise inspection of his bus.

45. All of the allegations contained in this affidavit are based on his own personal knowledge.

/s/ Jeffrey J. Faulk, Sr.
JEFFREY J. FAULK, SR.

THUS DONE AND SIGNED before me, the undersigned Notary Public on the 1st day of March, 1993.

/s/ Nicole R. Daspit
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF VERMILION

BEFORE ME, the undersigned Notary Public, personally came and appeared:

J. ISAAC FUNDERBURK

a resident of the Parish of Vermilion, State of Louisiana, who after being duly sworn did depose and state:

1) That he functioned as attorney no behalf of Jeffrey J. Faulk, Sr., concerning the charges of corporal punishment lodged against Faulk by the parents of Randy Baldridge, and represented Faulk during the investigation conducted by the investigative committee appointed by the Superintendent;

2) That after the Board imposed a ten (10) day suspension upon Fauk in connection with the alleged corporal

punishment, he (Funderburk) was told by the Board's counsel, Calvin "Woody" Woodruff that if Faulk did not take the suspension, he would be inviting a removal hearing pursuant to LSA-R.S. 17:493.

/s/ J. Isaac Funderburk
J. ISAAC FUNDERBURK

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public in and for the aforesaid state and parish on this 20 day of May, 1992.

/s/ Michael J. Herpin
NOTARY PUBLIC
MY COMMISSION EXPIRES AT DEATH

Bus Safety - File # EDC

Handbook for

Bus driver never hand-out-(prepared)
not approved by Bus
drivers Assoc
part of contract -
Never brought before the
Board for approval;
therefore never
handed out.

A That's what the policy says, yes.

Q Who formulated this policy?

A The policy was formulated by Mr. Funderburk, our legal counsel, and the members. We negotiated that out.

Q All right.

A And that became part of the Board policy.

Q Now, so you say that he appointed one of the --

A Right.

Q -- committee members, and you appointed the two others?

A Yes, there was two appointed by myself and one by him.

Q Who did you appoint?

A Myself and Mr. Alleman, assistant superintendent.

Q You appoint -- by what authority do you appoint yourself? You appointed

yourself.

A It's part of the policy.

Q Where is it in the policy? I'm sorry, you'll have to show me.

A I appointed myself and Mr. Allen to the investigative team and Mr. Faulk requested -- I have a Fax here from Mr. Funderburk to Mr. Woodruff, requesting the services of Linda Guidry, be the third member of the investigative team.

Q I understand that. But my question to you is, where do the procedures here that were formally adopted authorize you to appoint yourself?

A (No reply)

Q You can't find it anywhere?

A No, but it doesn't say I can't.

Q It says, "The superintendent shall appoint an investigation team of three members."

A (Nods head)

Q So you consider -- the fact that you've got the power of appointment, that means you appoint yourself, you've got the power to appoint yourself?

MR. JUNEAU:

I'm going to object on the basis that you're being argumentative.

EXAMINATION BY MR. SIMON:

Q Is that your interpretation of this?

A Yes.

Q You have ever appointed yourself before?

A (Nods head)

Q You do it every time?

they told him at the time --

A That's right.

Q -- that they were not injured?

A No, I take his word.

Q You assume that that's true when he said he asked the children --

A Yes, sir.

Q -- and nobody complained?

A That's correct.

Q So, from that standpoint, then, if nobody was hurt and it was a minor accident, it was his responsibility -- his responsibility, then, to safely deliver the children home?

A It was, but it was his responsibility to report it.

Q All right. Now, when he got home, immediately upon getting home --

A (Nods head)

Q -- if he tried to report it, would that be immediately reporting it?

A Pretty close to, yes, I guess so.

A All right, and let me ask you, you also charge here that he attempted to prevent an investigation. What do you mean by that?

A Attempted to prevent an investigation. I think

July 11, 1991

Hon. Marcus A. Broussard, Jr.
Attorney at Law
105 Tivoli Street
Post Office Box 7
Abbeville, LA 70510

RE: Vermilion Parish School Board
v.
Jeffrey Faulk
My File No.: 91-7189-M

Dear Judge Broussard:

In reference to the above, please issue subpoenas for the following witnesses to appear at the Hearing which is presently fixed for July 30, 1991 at 6:00 p.m.:

1. Bennett Hulin, Hwy. 331, Erath, LA; (318) 937-6433;
2. Ray Broussard, 1910 Prairie Ave., Abbeville, LA 70510 (318) 893-2251;

3. Carroll Comeaux, P.o. Box 113, Maurice, LA 70555 (318) 893-3620;

4. Earl J. Broussard, 1630 Prairie Ave., Abbeville, LA 70510 (318) 893-1660;

5. Diana Duhon, 620 North Shireview Circle, Abbeville, LA 70510 (318) 893-8761;

6. Dr. Daniel R. Dartez, Superintendent, Vermilion Parish School Board, 220 South Jefferson St., Abbeville, LA 70511-0520 (318) 898-5770;

7. Mr. Wayne Causey, Farm Bureau Insurance company, Post Office Box 44, Abbeville, LA 70511-0044 (please have Mr. Causey produce his entire claim file concerning an accident which happened on or about May

1, 1991 between an insured of Farm Bureau Insurance Company named Jeffrey Faulk and a vehicle

Being owned and driven by Mr. Bennett Hulin, Hwy. 331, Erath, Louisiana, said file to include but not be limited to, any writings reflecting the claims of Tabitha Frederick, Michelle Frederick, Crystal Frederick, and Jennifer Bourgeois).

Please be advised that Mr. Faulk desires a private hearing at this time. Please be further advised that the fact that we are requesting subpoenas to be issued to order to protect the rights of Mr. Faulk should not be construed as an admission that the Hearing is being held

according to law. It is the position of Mr. Faulk that this hearing is being being illegally held for the reason that Superintendent Dartez is bringing charges against Mr. Faulk without the approval of the School Board. The applicable statute provides that charges can only be brought by the superintendent with the approval of the School Board. A review of the Minutes of the School Board since May 1, 1991 indicates that the School Board has never authorized or approved the brining of the charges by Superintendent Dartez. Obviously, approval means that the School Board must vote to bring these charge and a majority of the School Board members must concur before the Superintendent can bring charges and a Hearing be held.

If you have any questions, please feel free to call.

With kind regards, I remain

Very truly yours,

/s/Howard W. Martin

Howard W. Martin

HWM:vdr

INVESTIGATIVE COMMITTEE REPORT ON COMPLAINT OF IMPERMISSIBLE CORPORAL PUNISHMENT

February 25, 1992

Committee Members:

Dr. Daniel Dartez, Superintendent

Mr. Clifton Alleman, Jr., Assistant Superintendent

Lynda Guidry, LAE UniServe Director

Complaint by Randy Baldridge, J.H. Williams Middle School student, of being backhanded by Mr. Jeffery Faulk, Vermilion Parish School Bus Driver.

Date of incident: Friday, January 24, 1992

Investigative hearing held: February 13, 1992, and continued on February 19, 1992

Committee's report is as follows:

Facts that committee agrees upon:

The students testifying have been documented as having given trouble to

their bus drivers.

There was excessive (barking) noise on the bus to the point where the bus driver, Jeffery Faulk, felt he had to stop the bus to restore order.

There are inconsistencies in the stories of the witnesses who testified that Mr. Faulk had backhanded Randy Baldridge. These inconsistencies are:

1. Their actual seat positions: Randy Baldridge testified he was sitting in the middle of the front seat while his two seat mates, Brandon Romero and Brandon Baldridge, testified he had the window seat. This was also supported by Shawn Campbell, who was sitting across the aisle.

2. Disagreement as to where Randy Baldridge was hit. Shawn Campbell and Brandon Baldridge said Randy

Baldridge was backhanded by Mr. Jeffery Faulk. Brandon Romero said that Randy Baldridge was hit on the cheek or chest, but not very hard. Mr. Blane Saunier testified that Nicondau Williams, in a statement to him, said that she did not see any physical contact.

3. In a written statement through his legal counsel, Mr. J. Isaac Funderburk stated, "Mr. Faulk stood up and told Randy Baldridge to shut up and sit down. Randy Baldridge ignored Mr. Faulk....Mr. Faulk then told Randy Baldridge to shut up and sit down or else I'll take you to the office like I did your brother. I'll have you expelled if you don't behave. During this verbal exchange, Mr. Faulk was pointing to Randy's seat with his left hand.

This gesture emphasized where Randy was to sit."

4. In a letter signed by Kevin Dennis, an Abbeville High School student, stated Randy lied on Mr. Jeffery Faulk. Mr. Jeffery did not slap him.

5. Three students in the front seat testified that Jeffery Faulk never told them to stop barking, but Jeffery Faulk and a student testified that he had told them several times to stop.

The following are conclusions reached by the committee:

1. The students were barking, and on more than one occasion were told to stop by the bus driver.

2. Because of conflicting stories, the committee cannot access exactly what and how the incident occurred, but

an incident did occur which caused Randy Baldridge to stand up and curse the bus driver, Jeffery Faulk.

3. The committee questions the reason why the incident was not reported to the school officials until the following Monday, because normally an incident of this magnitude would be reported immediately to the school administration.

4. The committee questions the investigative procedure used by the Assistant Principal where more than one witness was allowed to present his testimony in the presence of other witnesses.

5. The committee questions the validity of Jeffery Faulk's written statement, and do not feel it is an accurate representation of the actual alledged incident.

/s/ Dr. Daniel Dartez

Dr. Daniel Dartez,

Superintendent

/s/ Clifton Alleman, Jr.

Clifton Alleman, Jr.

Assistant Superintendent

/s/ Lynda Guidry

Lynda Guidry, LAE UniServe

Director

April 2, 1992

TO: School Board Members

FROM: Dan Dartez, Supt.

Re: Complaint against Jeffery Faulk

Background:

As a result of a report developed from an investigative committees hearing, there basic facts in this case are known:

1. There are inconsistencies in the testimony of the eye witnesses. The inconsistencies rest mainly as to the actual seating positions of the eyewitnesses and as to whether Mr. Faulk's hand struck Randy in the face or in the chest area.

2. Mr. Jeffery Faulk did strike Randy Baldridge, Jr. However, his intent as to whether the action was a reflexive reaction, a premeditated action, or simply reaching to grab Randy could not be substantiated.

3. Mr. Faulk's initial written responce to the complaint was not an accurate representation of the incident.

Superintendent's Recommendation with Rationale:

Mr. Faulk's action, as investigated, is deserving of School Board reprimand. The severity of the reprimand should be either:

A short suspension without pay; or

A strong letter of reprimand for his personnel file.

I would not recommend the convening of a La. R.S. 17:493 Hearing for termination due to legal ramifications arising from the inconsistent testimony. A position supported the Board's legal counsel who also participated in the hearing process.

ABBEVILLE MERIDIONAL

Wednesday, July 31, 1991

JEFFERY FAULK SUSPENDED FOR BUS ACCIDENT

By Angie M. Hebert

Louisiana bus Association President and Vermilion Parish Bus Association President Jeffery Faulk was found guilty as charged during a two-hour special meeting of the Vermilion Parish School Board Monday night.

The board unanimously found Faulk guilty for failing to notify police and School Board officials about a bus accident in May, 1991 while transporting students in Vermilion Parish. The charge was motioned by board member Anthony Fontana and seconded by Hermain Suire.

"We were first notified by calls from parents of kids injured. For this type of accident it is state law to report it," said Vermilion Parish School

Board President Kibbie Pillette.

Faulk did not come forth with a report to the School Board until July 3, after personally paying for all repairs on the other vehicle involved in the accident.

As a result of disciplinary action taken by board members at the special meeting, Faulk will be suspended from bus driving duties in Vermilion Parish for five days without pay, effective the first day of the 1991-92 school year.

Faulk had no comment to share with the media upon hearing the verdict of the board.

"It is not the decision of the bus driver to decide if the accident is severe or not. He is required to notify the police and the school board. We can not afford for an employee to break policy" concluded Pillette.

THE ADVERTISER

Thursday, August 1, 1991

VERMILION SCHOOL BOARD SUSPENDS BUS DRIVER

By Catherine Trahan

Acadiana Correspondent

ABBEVILLE - Louisiana Bus Association and Vermilion Parish Bus Association President Jeffery Faulk has been suspended without pay for five days.

The decision was made following a two-hour hearing at Tuesday night's special Vermilion Parish School Board meeting.

Faulk was found guilty by the board of failing to notify police and school board officials about a bus accident that occurred in May 1991 while he was transporting students.

The suspension begins on the first day of the 1991-1992 school year.

According to board members, the board was notified of the accident by parents of children who received minor injuries.

"We were notified by calls from parents of injured kids," said board President Kibbie Pillette. "State law says that accidents must be reported."

Faulk personally paid for repairs for the other vehicle involved in the accident but did not report the accident to the board until July 3.

It is not the decision of the bus driver to decide how serious an accident is," said Pillette. "We cannot afford for an employee to break policy."

Faulk had no comment on the matter.

THE ADVERTISER

Saturday, August 3, 1991

VERMILION BUS DRIVER TAKES EXCEPTION TO SUSPENSION BY BOARD

By Catherine Trahan

Acadiana Correspondent

ABBEVILLE - Jeffery Faulk, president of the state association of bus drivers and the Vermilion Parish bus drivers association, denies any wrongdoing regarding his suspension.

He was suspended for five days without pay for allegedly failing to report an accident to the Vermilion Parish School Board.

Faulk met with reporters Friday morning, three days after a hearing which lead to the board's decision for suspension.

Faulk says he did report the May 1 accident as soon as he finished the bus

route.

"When I got home, my supervisor had already been notified about the accident by parents but I would have reported it anyway," Faulk said.

"My only error was in not calling the police," he said, "but I did go later to receive an accident report for insurance purposes."

According to Faulk, the accident was minor and he agreed to personally pay for the other vehicle's damages.

"I saw it was very minor and I asked the children three times if anyone was hurt and they told me no," said Faulk.

"I continued on my route because no one said they had been hurt," he said.

But some children did report to the hospital for minor injuries according to Faulk and it was these parents who notified Faulk's supervisor of the

accident.

"The board says I didn't follow policy but I never saw a policy handbook before now," said Faulk.

"Anyway, board policy says I have to notify my supervisor of the accident and I did that when she called to question me about the accident," he said.

"This is a political thing because I was told by a board member that many wouldn't support me because I had tried to tell the board what to do one time," Faulk said.

"I did not break any policy and I am not guilty of anything," he said.

Faulk said he is considering filing a lawsuit against the school board for defamation of character.

He has worked as a bus driver in the system for 24 years.

ABBEVILLE MERIDIONAL

Sunday, August 4, 1991

FIVE-DAY SUSPENSION UNJUST; NO POLICY BROKEN ACCORDING TO FAULK

By Gwen Broussard

The president of the Vermilion Parish School Bus Driver's Association said Friday his five-day suspension is unjust and that he did not break any school board policy.

Jeffery Faulk was suspended for five days without pay by the school board during a special meeting last Tuesday night for "willful neglect of duty and incompetence." In the letter advising Faulk of the hearing disciplinary action, the board said Faulk was neglectful of his duty because of his failure to report an accident and his actions in attempting to prevent the investigation of the accident and a report being made.

Friday morning, Faulk called a press conference to tell his side of what happened.

The charges stem from an accident Faulk was involved in while transporting students home on the afternoon of May 1. According to Faulk, he was crossing the Vermilion River Bridge on the Hwy. 14 By-Pass when it began raining. For some reason, the truck in front of Faulk stopped and the bus hit the rear of the truck.

"I asked the kids two times before I got out of the bus if they were hurt," Faulk said. "Then I talked to the driver of the truck. He said he was not hurt. There was only minor damage to the bumper of the truck.

"We did not discuss calling the cops at any time. We only discussed repairing his truck. Then I went back in the bus

and asked again if the children were hurt. Then I went on and delivered the children home."

Though the children had said they were not hurt when Faulk asked them, the child at the first stop and the four children at the second drop-off were brought for medical attention to the hospital and family doctors. The parents also called the school board office, notifying them of the accident.

"At 4:15 when I got home, Dee (Duhon, Coordinator of Transportation) had called and I had to call her back. She told me some of the kids were hurt and had gone to the hospital. I went to the hospital but they told me the kids were not hurt and had gone home."

Faulk said he spoke to both school board member Anthony Fontana and Superintendent Daniel Dartez the next

day. The advised Faulk to get an accident report, which he did on May 2.

Faulk said when he spoke to board members several days later, he was told some members were upset because Faulk had earlier told the board "you have to follow the law."

Faulk was then notified by letter in early June of an investigative hearing set June 18. Because the board is required to have 20 days notice, the date was changed to June 25.

"They had not charged me with anything and state law says you don't have a hearing if you are not charged with anything," Faulk claimed.

Faulk's attorney was going to be out of tow on that date so the hearing was rescheduled for July 30 and a third letter was sent charging him with willful neglect on duty.

Faulk said he asked the board to subpoena seven witnesses for the hearing but the board only allowed two to testify, Duhon and his former supervisor, Earle Broussard. Both Duhon and Broussard testified that they had never given Faulk a copy of any policy concerning accidents.

Faulk said a copy of the policy has been given to him since the accident. The policy titled "Bus Safety for all Drivers" was adopted July 1, 1982. Superintendent Daniel Dartez signed the copy given to Faulk on June 14, 1991, confirming that the policy had been in effect since 1982 and remains in effect.

"How can the board expect you to follow a policy if you never saw it?," Faulk continued, "I didn't break no policy.

"I didn't call the cops because I

felt it was very minor. Their policy doesn't even say to call the cops.

"They said I broke rule 25 to report all accidents to the principal or supervisor immediately. What is immediate? I called my supervisor at 4:15 p.m. (May 1) when I got home.

"But they can see I followed rule 15. It says don't leave the bus to go to the phone in case of an accident. It says to send two kids to the nearest residence. But, what if something would happen to those kids."

Faulk who has been a Vermilion Parish School Board driver for the past 24 years, said he had no accidents on his record before this and does not feel justice was served in his case. Since the hearing was final, Faulk said his only recourse now is through the court system and he is considering a lawsuit.

ABBEVILLE MERIDIONAL

Friday, April 3,1992

BUS DRIVER IS SUSPENDED FOR STRIKING STUDENT

By Craig Mergist

Vermilion Parish school bus driver Jeffrey Faulk was suspended with pay for 10 days Thursday for striking a student and failing to report the incident in a timely manner.

The action came after the Vermilion Parish School Board met behind closed doors for more than one hour.

Board members accepted an Investigation Committee report on the incident. The report stated the committee found Faulk "imposed impermissible corporal punishment" while correcting a student who was barking on his bus in January.

The report also stated that there

was conflicting testimony concerning the incident and that it was unsure if Faulk meant to hit the student or if his hand just brushed the student.

Citizens for Public Education (CPED) went on record Thursday in support of a tax if it were dedicated to areas "which would enhance education," according to Edlbert Dawson, CPED president.

"We are ready to go forward with education," Dawson said. "We must come together as a School Board with parents and teachers, public schools as well as private schools.

"We're not a watchdog organization, but we will holler 'tripe' if tripe is served," Dawson said.

He complimented the board for some of its recent cost-saving measures, such as the central bus shop.

Finance committee chairman Tony

Fontana said his committee would be willing to attend a meeting of CPED to discuss the financial situation of the school system and answer any questions the group may have.

Three principals of the year were recognized at the start of the meeting.

Clarence Moss of Abbeville High received a plaque for being named High School principal of the year, while Ebrar Reaux of Erath Middle was Middle School Principal of the Year.

Teddy Broussard received a double honor. He was named Elementary School Principal of the Year and also won the title of Regional Elementary Principal of the Year.

Board members presented a $17,000, four-year scholarship to Jessica Trahan of Abbeville High School. She plans to attend Nichols State University.

The board also adopted a resolution in recognition of Mary Pat Huval's contributions as the parish Drug Free Coordinator.

"Mary Pat is a special individual," Bonnie Broussard said. "She has been there any time anyone at Vermilion Takes A Stand has called."

Broussard spearheaded and is in charge of the Vermilion Takes A Stand anti-drug program.

The board's finance director, Karl Bruchhatus, told the board revenues for February were $3.35 million and expenditures were $2.68 million, but that utilities or running higher than anticipated.

For the fiscal year-to-date, revenues are $21 million and expenses are $17.56 million,f or an operating gain of $3.43 million.

The board adopted a resolution to request local legislators conduct a feasibility study to see if it may be more efficient to purchase textbooks for publishing companies rather than from the state book depository.

The board's legal advisor, Calvin Woodruff, Jr., said he is continuing his investigation into billing irregularities for past legal assistance.

Board members also adopted a policy on attendance zone requirements.

The policy states "Vermilion Parish students shall attend school in the attendance area in which they are legally domiciled."

The school principal will be responsible for monitoring the school enrollment list and shall immediately terminate or transfer a student found to be out of zone.

"All students must have in their file an updated domicile form signed by a parent" or legal guardian.